

**Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.1
(Current Rule 3-110 Disc.)
Responsibilities of Managerial and Supervisory Lawyers

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 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. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. 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.”¹ 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 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 that 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 that 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.

¹ 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].)

The following is a summary of proposed rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers).² This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.1 adopts the substance of ABA Model Rule 5.1. Paragraph (a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that all lawyers in the firm comply with the Rules of Professional Conduct and the State Bar Act. Paragraph (b) requires that a lawyer who directly supervises another lawyer make “reasonable efforts to ensure” the other lawyer complies with the Rules of Professional Conduct and the State Bar Act, whether or not the other lawyer is a member or employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for a subordinate’s rules violation under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the subordinate, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

There are nine comments to the rule. Comments [1] – [4] describe the duties of managerial lawyers to reasonably assure compliance with the rules under paragraph (a). Comment [5] states that whether a lawyer has direct supervisory authority over another lawyer in a specific instance is a question of fact. Comments [6] – [9] elucidate on a supervisory lawyer’s responsibility for another lawyer’s violation.

National Background – Adoption of Model Rule 5.1

As California does not presently have a direct counterpart to Model Rule 5.1, 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 5.1: 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

Thirty-one states have adopted Model Rule 5.1 verbatim. Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1. Five states have adopted a version of the rule that is substantially different to Model Rule 5.1. One state has not adopted a version Model Rule 5.1.³

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added Comment [6] which is derived in part from proposed rule 5.2(b). In addition, the Commission has modified Comment [3] for clarity and deleted Comment [9] as unnecessary.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

² The executive summaries for proposed rules 5.2 and 5.3 are provided separately.

³ The one state is California.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.1

Commission Drafting Team Information

Lead Drafter: Robert Kehr

Co-Drafters: Joan Croker, Judge Karen Clopton, Howard Kornberg,
Toby Rothschild

I. CURRENT ABA MODEL RULE 5.1

**[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, 2017

Action: Recommend Board Adoption of Proposed Rule 5.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 5.1

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (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 LawyerLawyers

- (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~~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. ~~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

There are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, however, there is predicate authority in the California Rules and case law that is in line with those rules. See Section XIII.A Related California Law, below.

For background on the concepts relating to the duty to supervise refer to Report and Recommendation for proposed Rule 1.1, Section V.

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.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

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

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 supervision duty to a different rule that is structured differently.
2. Competence and supervision can be hard to distinguish, so separating the two duties will lead to unwanted charging errors.
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.

Commission Response to #1-3, above: The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national 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).

4. Comments [5], [6], [8], and [9] are unnecessary and merely repeat the Rule and Comment [6] also is obvious and not needed.

Commission Response: 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.

- **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.

Commission Response: The duty to supervise currently is part of the competence rule, but the Commission believes that adoption of proposed Rule 5.1 will make clear to lawyers who manage law firms the importance of assuring ethical conduct within the firm and will make clear to supervising lawyers that supervision includes ethical conduct, and will clarify the limits on a supervisor's responsibilities.

2. Comments [5], [8], and [9] are unnecessary and merely repeat the rule.

Commission Response: The Commission disagrees with the commenter as to Comments [5], [8], and [9]. The Commission believes each of those comments provide helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

3. The first sentence of Comment [7] is unnecessary.

Commission Response: The Commission disagrees with the commenter's assessment. The sentence provides context for the following sentence and explains the text of the proposed Rule.

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.

Commission Response: The definition of "knowingly" recognizes that a person's knowledge may be inferred from circumstances, and the Commission believes this will encompass the same field as currently covered by conduct previously labeled with other terms.

5. The Comment [9] discussion of paragraphs (a) through (c) merely repeats the rule and is unnecessary.

Commission Response: The Commission believes this sentence helps to explain the text of the proposed Rule.

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.

Commission Response: The Commission has not made the suggested change. Comment [1] of Rule 8.4.1 does not impose liability on a lawyer as only the black letter text can be a source of discipline. However, Comment [1] of Rule 8.4.1 does clarify that subparagraphs (b)(i) and (ii) of the rule prohibits a lawyer in a firm from “knowingly permit[ting]” discriminatory conduct prohibited by the rule. Under paragraph (c)(2) “knowingly permit” means “to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b).” Nevertheless, liability would not be imposed on the lawyer because of the conduct of others in the firm but because of the lawyer’s own failure to comply with the rule and engage in conduct that advocates corrective action.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. One comment agreed with the proposed Rule, two comments disagreed, and two comments agreed only if modified. During the 45-day public comment period, two public comments were received. One comment disagreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

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.

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.”¹ This Discussion paragraph provides citations to seven lawyer disciplinary cases, which 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.

2. Authorities Considered by the Commission

The following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *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] (Lawyer blamed his staff for mistakes in securing an execution against client’s husband to

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.)

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.)

B. 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 December 8, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.authcheckdam.pdf [last checked 2/14/17]
- Thirty-one jurisdictions have adopted Model Rule 5.1 verbatim.² Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1.³ Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 5.1.⁴ 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).

² The thirty-one jurisdictions 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.

³ 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.

⁴ The five jurisdictions are: New Jersey, New York, Ohio, Oregon, and Texas.

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 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. 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:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of 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