

Rule 1.1 Competence
(Redline Comparison of Revised Proposed Rule 1.1 DFT3 to DFT2.4*)

- (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this Rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless might provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or [association or consultation with](#), another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances.¹

Comment

This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

* Proposed Rule 1.1 DFT2.4 appears on pages 1 – 2 of the 1.1 Report and Recommendation document

¹ Paragraph (d) appears in almost the same wording as part of the *Discussion* to current rule 3-110. We propose moving it into the Rule because of the Supreme Court’s expressed concern about Comments that contradict the Rule.

**Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
(Proposed Rule 5.1 DFT2.4 – CLEAN)**

- (a) Each partner in a law firm, and each 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 comply with these Rules and the State Bar Act.
- (b) Each 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 is a partner, or individually or together with other lawyers has comparable 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 Partners and Managers To Reasonably Assure Compliance with the Rules.

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

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

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities might not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, each 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 managers to make reasonable efforts to assure that other lawyers in the 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 Lawyer as Supervisor

[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] 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 partner, manager, or supervisor must intervene to prevent avoidable consequences of misconduct if the lawyer knows that the misconduct occurred.

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

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

[9] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.1 Responsibilities of ~~a Partner or~~ Partners, Managers, and Supervisory ~~Lawyer~~ Lawyers
(Redline Comparison of Proposed Rule 5.1 DFT2.4 to ABA Model 5.1)

- (a) ~~A~~Each partner in a law firm, and ~~a~~each 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~~Each 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 individually or together with other lawyers has comparable 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 Partners and Managers To Reasonably Assure Compliance with the Rules.

[21] Paragraph (a) requires partners and 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.

~~[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.~~

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

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities might not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, each 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 managers to make reasonable efforts to assure that other lawyers in the 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 Lawyer as Supervisor

~~[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 remedial action by a partner or managing lawyer~~

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

~~[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the immediacy of that lawyer’s involvement and the nature and seriousness of the misconduct and the nature and immediacy of its harm. A partner, manger, or supervisor is required to must intervene to prevent avoidable consequences of misconduct if the supervisor 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.~~

~~[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] 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.

~~[78]—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 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.~~

~~[89] The duties imposed by this Rule on managing and supervising lawyers do This Rule does not alter the personal duty of each lawyer in a law firm to abide by comply with the Rules of Professional Conduct. See Rule 5.2(a). the Rules of Professional Conduct. See Rule 5.2(a).~~

**Rule 5.2 Responsibilities of a Subordinate Lawyer
(Redline Comparison of Revised Proposed Rule 5.2 DFT3 to DFT2.4*)**

- (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 a of professional duty.

Comment

[1] A lawyer is not relieved of responsibility for complying with these Rules and the State Bar Act by reason of acting at the direction of a supervisor, but this might be relevant in determining whether the subordinate lawyer has violated the Rules or the State Bar Act. For example, a subordinate who signs a frivolous pleading at the direction of a supervisor would not commit a violation unless the subordinate knows of the document's frivolous character.

~~A subordinate lawyer has no general obligation to supervise a supervising lawyer. For example, a subordinate who signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the State Bar Act unless the subordinate knows of the document's frivolous character.~~

[2] 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.

* Proposed Rule 5.2 DFT2.4 appears on page 23 of the 1.1 Report and Recommendation document.

Rule 5.2 Responsibilities of a Subordinate Lawyer
(Redline Comparison of Revised Proposed Rule 5.2 DFT3 to ABA Model Rule 5.2)

- (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~~a of professional duty.

Comment

[1] ~~Although a~~A lawyer is not relieved of responsibility for ~~a violation by the fact that the lawyer acted~~complying with these Rules and the State Bar Act by reason of acting at the direction of a supervisor, ~~that fact may~~but this might be relevant in determining whether ~~a lawyer had the knowledge required to render conduct a violation of the subordinate lawyer has violated~~ the Rules or the State Bar Act. For example, ~~if a subordinate filed~~who signs a frivolous pleading at the direction of a supervisor, ~~the subordinate would not be guilty of a professional~~commit a violation unless the subordinate ~~knew~~knows of the ~~document's~~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.

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
(Redline Comparison of Revised Proposed Rule 5.3 DFT3 to DFT2.4*)**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) each partner in a law firm, and ~~a~~each 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 the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) each lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer 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 individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, whether or not an 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

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *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 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

* Proposed Rule 5.3 DFT2.4 appears on pages 25 – 26 of the 1.1 Report and Recommendation document.

Rule 5.3 Responsibilities Regarding Nonlawyer ~~Assistance~~ Assistants
(Redline Comparison of Revised Proposed Rule 5.3 DFT3 to ABA Model Rule 5.3)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) ~~each~~ partner in a law firm, and ~~each~~ 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 the ~~person's~~ nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) ~~each~~ lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the ~~person's~~ person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of ~~the~~ these Rules ~~of Professional Conduct~~ or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with ~~the~~ knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, whether or not an 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) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.~~

Nonlawyers Within the Firm

~~[2] Lawyers generally employ assistants in their practice~~ often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the ~~lawyer's~~ lawyer's professional services. A lawyer

must give such assistants appropriate instruction and supervision concerning ~~the~~all ethical aspects of their employment, ~~particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.~~ See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; 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 [177 Cal.Rptr. 670]; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]. The measures employed in instructing and supervising nonlawyers should take account of the fact that they do~~might~~ not have legal training ~~and are not subject to professional discipline.~~

~~Nonlawyers Outside the Firm~~

~~[3]—A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.~~

~~[4]—Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.~~