To: Rules Revision Commission
From: Rule 1.3 Drafting Team (Tuft, Cardona & Langford)
Date: October 26, 2015
Re: Proposed Rule 1.3 [Diligence]
For: Consideration at November 13-14, 2015 Meeting

During the September 25-26, 2015, the Commission voted in favor of the concept of California having a rule that separately addresses a lawyer's duty of diligence. After further study, the drafting team proposes Rule 1.3 (Diligence) for the Commission's consideration. Attached to this memorandum are three rule drafts:

1. Proposed Rule 1.3, draft 2.3 (10/26/15), clean version.
2. Proposed Rule 1.3, draft 2.3 (10/26/15), redline, compared to Model Rule 1.3.
3. Proposed Rule 1.1, draft 4 (10/26/15), redline, compared to draft 3 (9/26/15), the version of Rule 1.1 that the Commission approved at the September meeting. The only change is to delete the reference to "diligence" in paragraph (b) of the Rule and add a comment cross-reference to Rule 1.3.

The drafting team offers the following reasons in support of California having a separate diligence rule:

1. Every jurisdiction, except California, has adopted Model Rule 1.3, has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence, or addresses diligence as a separate duty in its competence rule (Texas). We should do the same for purposes of clarity and consistency.

2. Although competence and diligence are often viewed together, they are distinct concepts of professional responsibility. The Model Rules and the Restatement of the Law Governing Lawyers provide that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. See, e.g., Rest (3d) Law Governing Lawyers §16, comment d.

3. For example, competence requires that a lawyer have sufficient learning and skill to ascertain the applicable period of limitations; diligence requires that being aware of the period of limitations, the lawyer must not allow it to expire due the lawyer's neglect and inattention.

4. Both the Model Rules and the Restatement (as well as text books, ethics opinions and other resources) consistently refer to the lawyer's duty of competence and diligence separately. See, e.g., Model Rule 1.7(b)(1) ("the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"); Rest. (3d) Law Governing Lawyers §16(2) (a lawyer must . . . "act with reasonable competence and diligence.")

5. Having a separate rule on the duty of diligence that includes a prohibition against undue delay provides needed public protection: "Perhaps no professional shortcoming is more widely resented that procrastination . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Model Rule 1.3, comment [3].

6. California case law is consistent with the requirements of Model Rule 1.3. See Vapnek, et. al. CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group. 2015) ¶¶. 6:92 ff.

7. Having a separate rule on diligence will not materially increase the risk that lawyers will be disciplined for an act of simple negligence. Lack of dedication to a client's matter may be the basis for civil liability but it is not the same as a negligent act or omission under tort law. Rule 1.3 is concerned with indifference and lack of dedication in carrying out the obligations the lawyer has assumed and furthers the lawyer's fiduciary duty of loyalty to zealously represent the client and maintain the client's trust and confidence.

Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence in representing a client.

(b) For purposes of this Rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer.

Comment

A violation of this rule may not be predicated on a single act of ordinary negligence.

Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence ~~and promptness~~ in representing a client.

(b) For purposes of this Rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer.

Comment

~~[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.~~
A violation of this rule may not be predicated on a single act of ordinary negligence.

~~[2] A lawyer's work load must be controlled so that each matter can be handled competently.~~

~~[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.~~

~~[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.~~
~~[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer~~

~~Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).~~

Rule 3-110 [1.1] Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, 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~~2) 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 may 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.

Comment

[1] 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.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable diligence.

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 of 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) – 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

[1] **NOTE**: Comments in this draft have not yet been revised to conform to the revisions to the black letter during the 9/25-26/15 meeting.

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, manger, 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 ~~Partners, Managers,~~ Managerial and Supervisory Lawyers[1]

(a) ~~Each partner in a law firm, and each~~ 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 comply with these Rules and the State Bar Act.[2]

(b) ~~Each~~ A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,[3] shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.[4]

(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[5] of the specific conduct, ratifies the conduct involved; or (2) the lawyer, ~~is a partner, or~~ individually or together with other lawyers, ~~has comparable~~ 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 of 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.[6]

Comment[7]

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

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[1] Consensus to change title to conform to changes made during 9/26/15 meeting session.

[2] At the 9/26/15 meeting session, RRC2 voted 13-2-0 to recommend adoption of paragraph (a), amended as indicated.

[3] At the 9/26/15 meeting session, a motion to delete the clause "whether or not a member or employee of the same firm," failed by a 5-9-1 vote.

[4] At the 9/26/15 meeting session, the Chair confirmed the Commission's consensus to recommend adoption of paragraph (b), amended as indicated, to substitute "A" for "Each."

[5] At the 9/26/15 meeting session, a motion to delete the phrase "of the relevant facts and" failed by a 3-12-0 vote.

[6] At the 9/26/15 meeting session, RRC2 voted 12-3-0 to recommend adoption of paragraph (c)(2), amended as indicated to conform its language to the revisions to paragraph (a).

[7] **NOTE**: Comments in this draft have not yet been revised to conform to the revisions to the black letter during the 9/25-26/15 meeting.

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, manger, 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).

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

I. CURRENT CALIFORNIA RULE

Rule 3-110 Failing to Act Competently

(A) A member 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 member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion

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].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation. This recommendation is to adopt as Rule 1.1 the substance of current rule 3-110, to not adopt any version of MR 1.3, but to adopt versions of MRs 5.1, 5.2, and 5.3.

III. PROPOSED RULE (CLEAN)

Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

(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 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 5.1and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-110)

Rule ~~3-110~~1.1 ~~Failing to Act Competently~~Competence[2]

(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 undertaking ~~the~~ legal services ~~isundertaken~~,[3] the lawyer ~~may~~ nonetheless ~~perform such services competently~~ might

[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.

[2] We have not marked the minor changes made in moving to the ABA format such as changing "member" to "lawyer".

provide competent representation[4] by 1) associating with or, where appropriate, professionally consulting another lawyer ~~reasonably believed~~ whom the lawyer reasonably believes to be competent[5], or 2) acquiring sufficient learning and skill before performance is required.

(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 consultation with another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances.

~~Discussion:~~ **Comment**

~~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].)~~[6]

~~In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably~~

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[3] This is reordered from the passive to the active voice. Also, CRPC 3-110 is in the singular - "the legal service is" – the change to plural makes paragraph (c) consistent with paragraph (a) so that both are plural.

[4] The current rule has the slightly wordier "may nonetheless perform such services competently". The proposed change is intended to make the language simpler and more direct. Also, this changes "may" to "can" based on ¶4.2 of the Guidelines for Drafting and Editing Court Rules.

[5] The current "another lawyer reasonably believed to be competent" was changed by the first Commission to "another lawyer whom the lawyer reasonably believes to be competent." There is substance to this change from the passive to the active voice in that it makes clear that the inquiry will be undertaken from the perspective of the lawyer making the consultation. We recommend making this change.

[6] The first paragraph of the *Discussion* to the current rule explains the duty of supervision. We recommend that this be moved to the 5-series Rules, as explained below. Note that these citations generally have nothing to do with competent representation. For example, *Trousil v. State Bar*, 38 Cal. 3d 337 (1985) involved a lawyer's failure to pay settlement funds to a client, *Palomo v. State Bar*, 36 Cal. 3d 785 (1984) involved a lawyer's failure to supervise an employee's handling of his client trust account, never having instructed her on trust account requirements and procedures, and never having examined either her records or the bank statements for any of the office accounts, and *Crane v. State Bar of California*, 30 Cal. 3d 117 (1981) involved a threat in violation of what now is rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges").

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

~~necessary in the circumstances~~

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

V. PUBLIC COMMENTS SUMMARY

- Lisa Wilbur, May 4, 2015 (re: 3-110) Suggest competence rule specifically address cognitive impairment of aging lawyers.
- Stephen Gillers, June 9, 2015: (re: 5.1 and 5.3) Recommends adoption of the ABA model rules on the following topics: imputed conflicts and screening; special conflicts for government attorneys; multijurisdictional practice; sexual relations with clients; truthfulness in statements; and duty to supervise. Also recommends conforming to ABA conflicts rule for clarity.
- Scott Garner, COPRAC, June 16, 2015: (re: 5.1-5.3) Rules addressing supervisory obligations of lawyers which would put this obligation in the black letter rather than commentary.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 9/2/2015:**

The current language of rule 3-110 should be retained. The rule is well understood and there is extensive case law interpreting it. Additionally, the rule and case law address the duty to supervise attorney staff and employees.

With regard to the use of computer technology, a lawyer's duty of competence includes a duty to understand the technology he or she uses in the practice of law. Rule 3-110 is intended to be a general rule. Whether an attorney's failure to know and understand modern technology violates the competence rule should be evaluated in the context of the facts of each particular case. The same rationale applies to a lawyer who outsources services.

- **MIKE NISPEROS, OCTC, 9/4/2001:**

Proposed Rule 3-110. Failing to Act Competently

OCTC's recommends adding to the definition of competent representation and making it clear that reasonable diligence and prompt representation are required by this rule. The discussion section clarifies the definition of the word "repeated."

OCTC proposes the following revisions:

(A) A member 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 1) diligence, 2) learning and skill, ~~and~~ 3) mental, emotional, and physical ability reasonably necessary for the performance of such service; *4) thoroughness, and 5) preparation reasonably necessary for the representation.*

(C) A member shall act with reasonable diligence and promptness in representing a client. A member shall make reasonable efforts to expedite litigation consistent with the interests of the client.

~~(C)~~*(D) A member shall not represent a client when the member does not have sufficient time, resources, or current learning and skill to perform the services.* If a member does not have sufficient *current* learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with, or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient *current* learning and skill before performance is required.

Discussion:

. . .

As used in this rule the word repeated does not require that the conduct be repeated in a single client matter, but may be repeated conduct in the aggregate when several client matters are considered or taken together. As such, a repeated failure to perform legal services competently may occur when the member fails to do a certain act in connection with the representation of several or multiple clients. For example, it could constitute a repeated failure to perform legal services competently for a member to fail to file civil complaints on behalf of several or multiple clients prior to the expiration of the statute of limitations.

A member has the obligation to keep current in the law, to be diligent and act promptly on behalf of his or her client. An attorney must use his best efforts to accomplish with reasonable speed the purpose for which he was employed. (Butler v. State Bar (1986) 42 Cal.3d 323, 328.) A member should, therefore, not take a case if the member does not have the time, resources, or current learning and skill to perform the services properly, subject to the exceptions provided in the rule. (See In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684).

OCTC COMMENTS:

OCTC recommends some changes to the language of the rule and in the discussion. It is believed these recommendations do not change the law but, instead, state more precisely what the law is, as interpreted by the courts. However, there has been some difference of opinion among the judges as to whether a repeated failure to perform competently must occur within a

single client matter in order to constitute a violation of the rule or may be the result from a failure to do the same act on behalf of separate clients. The proposed changes would make it clear that several acts involving separate clients may be taken together where appropriate to establish a violation of the rule.

- **Commenter Name, State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Illinois Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The ABA State Adoption Chart for Model Rule 1.1, which is the direct counterpart to rule 3-110, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.pdf

- 39 states have adopted Model Rule 1.1 verbatim (AL, AZ, AR, CO, CT, DE, FL, HI, ID, IL, IN, IA, KS, KY, ME, MD, MA, MN, MS, MO, MT, NV, NM, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, VA, WA, WV, WI, WY); 7 jurisdictions have adopted something substantially similar to 1.1 (AK, DC, GA, LA, NE, NY, NC); and 5 states have adopted a version of the rule that is substantially different to Model Rule 1.1 (CA, MI, NH, NJ, TX)

The ABA State Adoption Chart for Model Rule 1.3, which has no direct California counterpart, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf

- 42 states have adopted Model Rule 1.3 verbatim (AK, AZ, AR, CO, CT, DE, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); 7 jurisdictions have adopted something substantially similar to 1.3 (AL, DC, GA, MA, NY, OR, VA); and 1 state other than CA has adopted a version of the rule that is substantially different from Model Rule 1.3 (TX places its diligence requirement in its Rule 1.01 and has not adopted MR 1.3).

The ABA State Adoption Chart for Model Rules 5.1 – 5.3 are posted at (see details below):

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.authcheckdam.pdf

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.authcheckdam.pdf
- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.authcheckdam.pdf

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

A. Concepts Rejected (Pros and Cons):

1. Should the rule should be revised to delete the long-standing California standard that subjects a lawyer to professional discipline for intentional, reckless, or repeated acts of incompetence and instead subject lawyers to discipline for acts of simple negligence?
   - Pros: The essential argument in favor of adopting the ABA approach is that it would create greater national uniformity and widen the scope of discipline for lawyers' professional errors.
   - Cons: Examining the difference between the current California disciplinary standard for competence ("intentionally, recklessly, or repeatedly fail to perform legal services with competence") and the ABA MR standard ("A lawyer shall provide competent representation to a client.") raises fundamental questions about the nature of professional discipline and the manner in which the disciplinary rules should be written.

   California's rationale for professional discipline is as follows: "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." *In re Kreamer*, 14 Cal. 3d 524 (1975). For additional discussion of the purpose of professional discipline, see Robert L. Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, Or Disciplinable Offense?*, 29 W. St. U. L. Rev. 235, 257-64 (2002). This applies in the context of competence.

   A lawyer's single act of simple negligence should not be the basis for discipline because it does not imply that the lawyer is unfit to practice law or that permitting the lawyer to practice would present a danger to the public. However, a lawyer's repeated, reckless, or intentional lack of competence in providing legal services does rise to that level. A lawyer's garden variety error therefore should continue to be limited to its civil consequences and should be remedied only through the civil courts. The disciplinary system should not be burdened by claims against lawyers based on an isolated act of simple negligence and lawyers should not be threatened by such claims. See *In the Matter of Torres*, 4 Cal. State Bar Ct. Rptr. 138, 149 (Rev. Dept. 2000) where the State Bar Court states: "We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation." See also *In the Matter of Riley*, 3 Cal. State Bar Ct. Rptr.91, 113 (Rev. Dept. 1994) and cases cited therein. Civil proceedings claiming common

negligence should not be skewed by an allegation that the lawyer has violated a fiduciary standard or is a danger to the public, but the proposed Rule properly would be informative in civil proceedings in which it is claimed that a lawyer's conduct rose above common negligence and violated fiduciary standards. The MR standard is a prime example of an aspirational expression that should not be confused with a disciplinary standard.

In fact, the ABA aspirational standard has led some states to discipline for what appears to be simple negligence, and in other situations to use MR 1.1 in circumstances that suggest greater culpability. Stating a disciplinary rule in terms of best practices will result in unpredictable consequences and a lack of effective notice to lawyers and to disciplinary authorities. See 29 W. St. U. L. Rev. 235, at 262 n. 134-137.

There is an additional problem with MR 1.1 in that its second sentence is written so as to focus on a lawyer's possession of the components of competence rather than requiring the lawyer to use and apply legal knowledge, skill, and thoroughness in the performance of legal services. The wording of that sentence leaves open the possibility that MR 1.1 makes it possible for a lawyer to be disciplined (or threatened with professional discipline) simply for not having demonstrated the appropriate level of legal knowledge, skill, or preparation even though there was no malpractice and no client harm (compare this current rule 3-110(B), which more clearly is definitional of competence and not itself the basis for professional discipline). The MR wording creates a potential trap for a lawyer who performed competently, but provides no additional protection to the public. The ABA language is informative in telling lawyers they should develop knowledge and skill and be prepared, but the ABA Rule is not connected to the outcome of the lawyer's work. Compare this to the current and proposed California Rules, both of which say that a lawyer "shall … apply …" diligence, learning, etc.

Retaining California's current standard would be consistent with the Commissions' charter in avoiding aspirational standards, would avoid changes to California rules that now work well, and would avoid an indefinite standard that would lead to unpredictable disciplinary and civil consequences.

2. Lisa Wilbur, in public comment dated May 4, 2015 suggested specifically addressing the cognitive impairment of aging lawyers.
   - Pros: None identified.
   - Cons: We recognize that impairment due to aging is an important topic, but we are unable to identify any way in which impairment due to age differs from impairment having any other cause. We also cannot see how to address any specific sort of competence in a disciplinary Rule. In addition, we do not see any way to write a disciplinary standard that would provide meaningful protection against any particular cause of deficient performance, whether that be age, substance abuse, or anything else.
3. Should paragraph (c) be augmented by adding "*4) thoroughness, and 5) preparation reasonably necessary for the representation"* as recommended by OCTC in a letter

dated 9/4/2001?

- Pros: This would be a fuller statement of what a lawyer should do in representing a client.
- Cons: From the standpoint of providing information to lawyer, as would be done in a practice guide, it would be correct to say that thoroughness and preparation are important. However, we conclude that thoroughness and preparation already are covered sufficiently by proposed paragraph (b), which speak of the application of diligence, learning and skill, so that adding this additional language would make the Rule wordier but not more accurate.

4. Should we recommend adoption of any of the MRs' six Comments.
   - Pros: None identified.
   - Cons: The Comments to MR 1.1 for the most part either are incorrect, conversational, expressions of good practices, or unneeded because included as part of the recommended Rule.

5. Should the standard of "recklessly" by augmented by the addition of "grossly negligent"? This addition was suggested by the law professors' March 3, 2004 letter?
   - Pros: The implicit argument in favor of this addition is that it would broaden the scope of potential disciplinary conduct.
   - Cons: The current standards of intentional, reckless, and repeated are well-established and well-understood in California law and have been the subject of multiple Supreme Court opinions; there is no evidence that they fail to meet disciplinary needs. Moreover, the meaning of "reckless" is conduct so far wide of the mark as to permit the inference that the deficiency was intended, in other words, conduct so extreme as to make it unnecessary for OCTC to produce any direct evidence of an intent to harm the client. See, *e.g.*, *Spindell v. State Bar of California*, 13 Cal. 3d 253, 260 (1975): "However, even if we accept petitioner's contention that he lacked knowledge of Mrs. Amey's attempts to communicate with him and that he did not deliberately intend to ignore her needs, his conduct in the instant case fully supports the Board's finding of a willful dereliction in the discharge of his professional duties to Mrs. Amey. Failure to communicate with, and inattention to the needs of, a client are proper grounds for discipline. (citations omitted) Petitioner's failure to communicate with his client despite her persistent efforts to speak with him and his delay in obtaining a dissolution of marriage demonstrate, in his own words, 'extreme neglect.'" Thus, the standard of recklessness is treated as the same as gross negligence. To the same effect is *Davis v. State Bar*, 33 Cal. 3d 231, 238 (1983): "[Petitioner's] usurpation of his client's decision can only be characterized as willful. If petitioner doubted either his client's credibility or the legitimacy of her claim, he should have questioned her closely and, if his doubts persisted, withdrawn from employment. (See Rules Prof. Conduct, rule 2-111(C)(1)(a).) Even if ignorant of the applicable professional standards, he is nonetheless culpable of gross negligence in his usurpation of his client's privilege and in his subsequent failure to represent her. We have previously noted that grossly negligent failure to represent a client warrants

discipline. (See Doyle v. State Bar (1976) 15 Cal.3d 973, 978 [126 Cal.Rptr. 801, 544 P.2d 937].)"

6. Should Rule 1.1 address a lawyer's responsibilities concerning the use of technology?[7]
   - Pros: On the recommendation of the ABA Ethics 20/20 Commission, MR 1.1, the ABA revised Comment [8] to state that maintaining competence includes knowledge of the "benefits and risks associated with relevant technology." Public protection might be enhanced by lawyers avoiding violations that are caused by inadequate knowledge of technology.
   - Cons: Any obligation a lawyer might have to understand the technology used in or available for use in the practice of law does not differ in kind from anything else a lawyer needs to utilize in providing legal services and would be the equivalent in an earlier generation of singling out Corpus Juris Secundum. In addition, advisory ethics opinions in California address this topic and provide adequate guidance. See, for example, Cal. State Bar Formal Op. No. 2010-179 (discussing confidentiality and competence issues when using "cloud" systems for client information) and Cal. State Bar Formal Op. No. 2012-184 (discussing virtual law offices). Special reference to technology in the Rule would not change its meaning; special reference in a Comment, as does the ABA, does not explain the Rule.

7. Should Rule 1.1 address outsourcing or offshoring of legal services?8
   - Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA added new Comments [6] and [7] that address a lawyer retaining or contracting with "other lawyers outside the lawyer's own firm." In part, this guidance alerts lawyers to the fact that the "ethical environments" of the jurisdictions in which other lawyers work is an important consideration in ethical outsourcing. Including a similar advisement might lead to better decision making by lawyers who outsource legal services.
   - Cons: We can see nothing in this topic that would make the proposed Rule more complete. As a Comment, this topic would not explain the Rule but instead would provide practice guidance on the possible risks of using outside lawyers.

8. Should Rule 1.1 include a Comment explaining proposed paragraph (c)?
   - Pros: There is some merit to this suggestion because there are circumstances in which it is not practical for a lawyer to consult with others or otherwise obtain sufficient knowledge to handle novel matter. As an extreme example, a lawyer's first criminal case should not be the prosecution or defense when the potential outcome is the death penalty.
   - Cons: We have concluded that the change from "may" to "might" makes a Comment

[7] MR Comment [8] states: " To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

[8] MR Comment [6] discusses at some length the situation in which a lawyer retains or contracts with other lawyers.

unnecessary. Paragraph (c) confirms that a lawyer's competence is not measured by what the lawyer knew previously but only by the quality of the lawyer's work for a client. The change to "might" makes clearer that the ability to research and consult is not proof that the lawyer's work turned out to be competent.

9. Should there be a Comment that explains what is meant by "repeatedly?
   - Pros: None identified
   - Cons: The question of when a lawyer's errors are sufficiently numerous to rise to a disciplinary level is entirely contextual. We cannot recommend any discussion that would be helpful and reliable.

10. Should the definition of "competence" in Proposed Rule 1.1(b) recognize differences in legal resources, skills, and expectations may exist between different communities? This was a comment made the RRC-1 by CA State Bar Law Practice Management & Technology Section. We recommend against this novel suggestion. We are not aware of any evidence that resources vary by locale, and in fact in the age of the internet we believe the opposite to be true, and we do not believe there should be different and indefinite standards of competence for disciplinary purposes.

11. Should the concept of diligence be contained in the competence rule or stated separately?

    Introduction:

    Current rule 3-110 implies an obligation to be timely because, for example, a lawyer is subject to professional discipline for repeated acts of malpractice that include missing statutorily or court-imposed deadlines for filings or other acts. This could occur in litigation, such as by missing statutes of limitation or discovery deadlines. This also could happen outside of litigation, such as by missing contractual required notices or non-judicial foreclosure deadlines.

    While the MR logically implies that diligence is an element of competence, MR 1.3 separately states: "A lawyer shall act with reasonable diligence and promptness in representing a client." According to the ABA's comparison chart, each of the other 50 jurisdictions reviewed by the ABA (49 states plus D.C.) has adopted MR 1.3, generally with no change.

    Although the MR is titled "Diligence", it requires both diligence and promptness. The MR Comments describe an even broader scope. In addition to diligence and promptness, the two requirements that presumably are intended as disciplinary standards, the Comments discuss:
    (i) a limitation on zealousness (so that a lawyer is not obligated to press for every advantage or act offensively); (ii) an obligation to not abandon a client (with reference to the termination rule, CRPC 3-700/MR1.16); (iii) the need to make clear when a lawyer-client relationship has terminated; and (iv) the prudent step for sole practitioners of having a succession plan to cover the lawyer's death or disability.

- Pros: The arguments in favor of adopting a version of ABA Rule 1.3 are that it provides an opportunity to highlight the importance of a lawyer's timeliness and national uniformity.
- Cons: There is good advice in MR 1.3 and in its Comments. As an example, Comment [3] begins: "Perhaps no professional shortcoming is more widely resented than procrastination." However, we conclude that the MR and its Comment amount only to advice, mostly about best practices and good client relations, and that they therefore should not be adopted as part of a Rule intended to serve as the basis for disciplinary proceedings. From a disciplinary standpoint, all that is needed is a rule that provides a basis for disciplining a lawyer whose tardiness causes client harm, and there already are two rules that serve that purpose. The first is proposed Rule 1.1. In addition, rule 3-700/1.16 states the only bases on which a lawyer may terminate a lawyer-client relationship, so that a lack of diligence amounting to client abandonment also can violate rule 3-700/1.16. See, *e.g.*, *In the Matter of Doran*,3 Cal. State Bar Ct. Rptr. 871, 1998 Calif. Op. LEXIS 6 (1998) (lawyer left a social security benefits hearing because he was "too upset" at a ruling to continue; the hearing went on in the lawyer's absence; the client's claim was denied; lawyer found to have violated rules 3-110 and 3-700) and *In the Matter of Aulakh*, 3 Cal. State Bar Ct. Rptr. 690, 1997 Calif. Op. LEXIS 190 (1997) (lawyer held to have violated rules 3-110 and 3-700 for failing to pursue appeal, leading to a default, after having filed a notice or appearance). Having a separate diligence rule would be redundant unless the Commission were to decide that a lawyer should be subject to professional discipline for tardiness that would not trigger discipline under proposed Rule 1.1 or 3-700/1.16; we believe a rule of that scope would go beyond any conduct that calls into question a lawyer's fitness to practice law, and that this would be true even if Rule 1.3 were revised to adopt the intentional, reckless, or repeated standard of Rule 1.1. Promptness and diligence should be retained where they are. The Restatement 3d of the Law Governing Lawyers, § 16, Reporter's Note to Comment *d* treats diligence as being a component of competence and not a separate duty, as does current rule 3-110, and we believe this is the best resolution.

B. Concepts Recommended (Pros and Cons):

1. Change from the passive to the active voice the language in current paragraph (C) that a lawyer may consult with "another lawyer reasonably believed to be competent".
   - Pros: The use of the passive voice leaves open the question of from whose perspective the reasonable belief is measured. By changing this to "another lawyer whom the lawyer reasonably believes to be competent" it becomes certain that the Rule addresses the reasonable belief of the lawyer making the consultation and therefore would be measured by the facts and circumstances known to that lawyer. Also, the use of the active voice is preferred under § 2.3 of the Guidelines for Drafting and Editing Court Rules.
   - Cons: None identified.

2. Adopt versions of MRs 5.1-5.3 rather than retaining the duty to supervise only as an element of the duty of competence.

   Rule 5.1 Introduction:

   MR 5.1 states, among other things, a lawyer's duty to supervise other lawyers, and MR 5.3 extends this concept to the supervision of non-lawyer personnel. The first paragraph of the *Discussion* to current rule 3-110 cites to a long line of California disciplinary cases that stand for the proposition that a lawyer's duties "include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." The fact that lawyers are subject to discipline and have been disciplined for failing to supervise make it arguable that MRs 5.1 and 5.3 are not needed. Despite this, we recommend the adoption of versions of these two MRs (and of MR 5.2, which addresses a subordinate lawyer's duties). Our reasoning is as follows

   - Pros:
     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 larger law firms 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. MRs 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include 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 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. MRs 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of CRPC 3-110.
     3. The broader application of MRs 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. MR 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 MR 5.2, there appears to be no conflict between MR 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. Adding a version of MR 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. MRs 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. An example would be local counsel who reports to and is directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.
6. Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, MR 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: MR 5.1 has been criticized as being too vague. For example, the first Commission received a public comment letter dated October 19, 2006 from Michael D. Schwartz, Special Assistant District Attorney for the County of Ventura, supporting the adoption of paragraph (c) but objecting to paragraphs (a) and (b) by saying, among other things: "It is not clear to me what actions the managing or supervising attorneys would be required to undertake to ensure that the other attorneys in the firm obey the rules. Enacting an office policy that attorneys must follow the rule would be superfluous since, as licensed professionals, every attorney is already legally obligated to comply with the rules." We respectfully disagree with this criticism. *First*, while an individual lawyer might be disciplined or suffer civil consequences after the fact, material client protection would be provided by having Rules that impose duties on supervising lawyers, leading to greater compliance before the fact. *Second*, there are some duties that require firm-wide systems, such as the creation and enforcement of conflict checking policies in order to avoid conflicts of interest. Mr. Schwartz's letter addressed MR 5.1 but his comments and our reply apply equally to MR 5.3.
- Recommendation: What follows are an unmarked version of each of our recommended Rules 5.1 – 5.3 followed by red-lined versions that compare to the first Commission's recommended version of the Rule. The first Commission's recommendations were nearly identical to the MRs:

The following is a clean version of proposed Rule 5.1:

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(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 of 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, manger, 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).

The following is a redline comparison of proposed rule 5.1 to the previous Commission's proposed rule 5.1:

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(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 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 complies with these Rules and the State Bar Act.[9]

(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;[10] or (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in

[9] See Comment [8] and its footnotes.

[10] The underlined language is borrowed from Michigan, as discussed below.

the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member of employee of the same law firm,[11] 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) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1(c) for the definition of "law firm".~~[12]

[~~2~~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 provide reasonable assurance that all lawyers in the law firm will comply with these Rules and the State Bar Act. 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.[13]

~~[3] Paragraph (a) also applies to internal policies and procedures of a law firm that involve compensation and career development of lawyer in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).~~[14]

[~~4~~2] Whether particular measures or efforts satisfy the requirements of paragraph (a) ~~may~~ 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.[15]

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[11] See Comment [8] and its footnotes.

[12] The first sentence of Comment [1] to the MR and the first Commission's version merely repeats the Rule and should be removed. The second sentence raises a drafting issue regarding the use of definitions and how readers will be alerted to the use of a term defined elsewhere. We recommend striking this sentence, but the Commission will need to decide the definition and cross-reference issues. Assuming there is a separate section for defined terms used in multiple Rules, one method for alerting the reader would be to place the defined term in italics.

[13] This Comment provides helpful explanation, and we recommend that it be retained with minor editing. Our suggested changes largely are intended to shorten the Comment by removing words that are quoted from the Rule.

[14] We do not see this explanation and these cross-references as being helpful in understanding the meaning or application of Rule 5.1. We recommend removing the entire Comment.

[15] It arguably goes without saying that there is no one single manner by which different law firms can comply with Rule 5.1. Nevertheless, we see no harm in retaining this Comment as written except that we have corrected the misuse of "may".

[~~5~~3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities ~~including lawyers with intermediate managerial responsibilities in a legal services organization, a law department or an enterprise or a governmental agency, may~~ 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, ~~such a~~ 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.[16]

[~~6~~4] Paragraph (a) also requires managers~~, including lawyers who are in charge of a public sector legal agency or the head of a legal department,~~ 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 ~~The~~ creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in ~~the a public sector legal~~ a public sector legal agency or other legal department. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).[17]

~~[7] Paragraph (a) does not apply to lawyer who hase only intermediate managerial responsibilities in public sector legal agencies and law department. See Comments [5] and [8].~~[18]

Paragraph (b) – Duties of Lawyer as Supervisor

~~[8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm.~~[19] ~~Paragraph (b) applies to all supervisory lawyers including lawyer who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.~~[20]

~~[9] A lawyer with supervisory responsibility over another lawyer has an obligation to~~

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[16] The reference to legal services organization, etc. is not needed if, as did the first Commission, the term "law firm" is defined to include them.

[17] The change is from passive to active construction.

[18] This Comment is not found in the ABA version. We recommend that it be removed because governmental and law department lawyers would have the same obligation as private lawyers to bring Rule 5.1-type problems to the attention of those with greater authority within the organization.

[19] If this is intended – and I think that it should be – it arguably changes the meaning of the Rule and therefore should be moved to the Rule. Part of the Commission's charter is to avoid Comments that contradict the Rule.

[20] The second and third sentences are redundant of the Rule and can be eliminated.

~~make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.~~[21]

[~~10~~5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. ~~A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.~~[22]

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

~~[11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer's conduct that violates these Rules and the State Bar Act~~.[23]

[~~12~~6] ~~Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be responsible for the conduct of the other lawyer, whether or not the other lawyer is a member or employee of the law firm. Appropriate~~ 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.[24] A partner, manger, or supervisor 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 consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1)~~.[25]

[~~13~~7] A supervisory lawyer ~~may~~ 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.[26]

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[21] This merely repeats the Rule and can be eliminated.

[22] The first sentence of this Comment is correct, and we see no reason not to retain it. The second sentence is problematic because it assumes that it always will be clear who is "in charge of a particular client matter". We therefore would retain the former and delete the latter.

[23] This Comment repeats the Rule without addition or explanation.

[24] It is not apparent why they immediacy of the supervisor's involvement helps determine whether particular remedial action is appropriate. Our editing is intended to make the sentence declarative and more accurate.

[25] We recommend removing material that only duplicates what is in the Rule, reordering what remains into a declarative sentence, and simplifying by removing the litigation example. We also recommend removing the example of dual responsibility because it is covered by proposed Comment [9].

[26] The word "may" is permissive. See ¶4.2 of the Guidelines for Drafting and Editing Court Rules.

[~~14~~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 ~~Whether~~ a lawyer ~~may~~ can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.[27]

[~~15~~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).[28]

COMPARISON OF PROPOSED RULE 5.1 TO APPROACHES IN OTHER JURISDICTIONS (national backdrop):

- Alabama Rule 5.1(a) removes: ", and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm," – This is a tempting change, the effect of which would be to make every partner in a firm subject to professional discipline if the firm does not have effective measures in place. On balance, we recommend against this. The ABA's version of the Rule recognizes that by focusing on the partners who have the power to effect firm changes, it focuses on a relatively small group that can make it their business to find out how to run things properly, for example, by learning how to design and operate an effective conflicts checking system. This is organizationally reasonable and more likely to have the effect desired by the Rule.
- Alaska Rule 5.1(c)(2) adds the underlined language: "…the lawyer is a partner or together with others has comparable managerial authority …." – we recommend against this change. The reference to managerial authority is important in 5.1(a) because it addresses the operation of the firm. On the other hand, Rule 5.1(c) is directed to individual action – correction of a subordinate's known Rule violation by a particular partner or direct supervisor. A firm partner or manager does not need to work with others to address a single subordinate lawyer's improper conduct.
- The D.C. Rule makes these changes:
  - 5.1(a) adds the underlined language: "… possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts …. that all lawyers in the firm or agency …." – this change is unnecessary if "law firm" is defined to include governmental law departments, as the first Commission did in its proposed Rule 1.01(c). We recommend that we not make this change.
  - Rule 5.1(c)(2) changes the order of the sentence and adds another reference to government law departments. We recommend against both changes, the former as unhelpful and the latter as unnecessary.

[27] I have reordered this sentence into a declarative form and corrected the misuse of "may".

[28] I see this as an informative cross-reference and recommend that it be retained.

- Fl. Rule 5.1 includes titles for paragraph (a), (b), and (c) that add nothing. Fl. Rule 5.1(c)(1) makes a trivial change in language that is not worth the time to discuss.
- The Mass. Rule makes two changes:
  - Its 5.1(a) removes the "comparable managerial authority" as did Alabama. As previously explained, we do not support this modification.
  - Its 5.1(c)(2) also removes "or had comparable managerial authority". We recommend against this change because there are situations in which senior associates or of counsel lawyer might have managerial authority and should comply with (c)(2).
- MI makes two changes:
  - Paragraphs (a) and (c)(2) remove the "comparable management authority" language as do the Alabama and Massachusetts versions.
  - Paragraph (c)(1) adds the underlined language: "…with knowledge <u>of the relevant facts</u> and the specific conduct, ratifies the conduct involved;" This change recognizes that the supervisor's knowledge of the conduct might not be meaningful to the supervisor without knowing the context in which the subordinate acted. This alteration seems right to us, and we recommend that its adoption.
- N.H. Rule 5.1(a) and (b) replaces "a" with "each". For example, (a) begins: "Each partner … and each lawyer …." This does not change the substance of the MR but we think it more sharply and clearly says what the MR and the first Commission's versions only imply. We recommend adopting this N.H. change.
- The N.J. version of Rule 5.1 makes multiple changes:
  - It removes from 5.1(a) the obligation of managers and makes it a duty of the firm. To the extent this makes sense (we don't think it does), it reflects the fact that N.J. is one of only two states that discipline law firms. We do not recommend that adopting this variation because it makes even less sense in the 48 states plus D.C. that don't discipline law firms.
  - It edits 5.1(c)(2) by removing the requirement of specific knowledge, thus potentially making a second lawyer responsible for the first lawyer's misconduct by ratifying the first the conduct without specific knowledge of it. A lawyer might or might not be negligent in ratifying another lawyer's conduct sight unseen, but we do not see the superior's doing so as implicating the second lawyer's fitness to practice. We do not recommend adopting this variation.
  - It adds 5.1(d) as follows: "(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate

> or holds some other comparable status with the firm." We are not aware of demonstrated need for a rule along those lines, and we do not recommend adopting this variation.

- NY is the other state that disciplines law firms, and it has removed the duty of firm managers along the lines of the NJ changes. It also has modified the personal liability standard that of paragraph (c) [paragraph (d) in the NY version] by adding that a managerial or supervisory lawyer has disciplinary liability for the conduct of a subordinate if "in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated." This seems to me to create a negligence standard, which I do not think is appropriate for professional discipline. We do not recommend adopting any of the NY variations.
- Ohio has adopted MR 5.1(c) without change but has omitted all of 5.1(a) and (b). For the reasons already explained, we favor adopting versions of paragraphs (a) and (b) and therefore do not recommend that we adopt Ohio's variation.
- As Ohio has done, Oregon Rule 5.1 retains MR 5.1(c) but omits all of 5.1(a) and (b). This eliminates all of the organizational responsibilities that we see as a major reason for adopting a version of MR 5.1. We do not recommend adopting this variation.
- Texas has a complete rewrite that we do not think adds anything but subtracts quite a bit from the MR. We don't recommend the Texas version because: (a) it omits the managers' duty to have compliance systems in place and properly operating; and (b) it adds references to governmental agencies that is unneeded if the definition of law firm covers governmental agencies (and Texas covers this too narrowly by applying only to the general counsel and thus eliminates the managerial authority element of MR 5.1(c)(2)). It states in full:

  > A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
  >
  > (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
  >
  > (b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

The following is a clean version of proposed Rule 5.2:

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.[29]

(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.[30]

Comment

[1] 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.[31]

[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.[32]

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[29] The first Commission changed the ABA's "is bound by the Rules of Professional Conduct" to the more forceful "shall comply with" in order to emphasize the mandatory nature of the subordinate lawyer's obligations. We recommend retaining that change.

[30] As explained above, I would strike this one word as did Ohio and Utah.

[31] This editing is for simplicity and directness.

[32] This is the same in substance to the MR's Comment [2], but I think better stated. My main concern about the MR version is that its first sentence, if taken out of context, directly contradicts the Rule ("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.").

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

The following is a redline comparison of proposed rule 5.2 to the previous Commission's proposed rule 5.2:

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.[33]

(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.[34]

Comment

[1] ~~The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act.~~[35] ~~Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acts at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules or the State Bar Act. See Rule 8.4(a)~~ A subordinate lawyer has no general obligation to supervise a supervising lawyer.[36] For example, ~~if~~ 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.[37]

[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 ~~arguable~~ question of

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[33] The first Commission changed the ABA's "is bound by the Rules of Professional Conduct" to the more forceful "shall comply with" in order to emphasize the mandatory nature of the subordinate lawyer's obligations. We recommend retaining that change.

[34] As explained above, we recommend striking this one word as did Ohio and Utah.

[35] The first sentence of this Comment is not in the MR version and does nothing but restate paragraph (a). We view it as surplus and recommend that it be removed.

[36] This sentence seems not to explain anything in the Rule but instead to make a separate point, which is that the subordinate is not obligated to supervise the supervisor (except when they dispute an identified professional responsibility issue in which the supervisor certainly is wrong). We have edited with the hope of making that point.

[37] This editing is for simplicity and directness.

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.[38]

COMPARISON OF PROPOSED RULE 5.2 TO APPROACHES IN OTHER JURISDICTIONS (national backdrop):

Almost every state had adopted MR 5.2 verbatim. The variations are:

- Connecticut did not adopt paragraph (b). We view this paragraph as important in striking a balance between a subordinate lawyer's role as a lawyer and as a member of an organization. We recommend retaining paragraph (b).
- Virginia has not adopted MR 5.2. As previously discussed, we recommend rejecting this approach.
- Ohio and Utah have omitted "arguable" from paragraph (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~~n arguable~~ question of professional duty." The Ohio and Utah change make sense in that the only pertinent question is whether the supervisor has given reasonable directions to the subordinate. The question of whether there was an "arguable question" is illogical surplusage because the supervisor's resolution cannot be reasonable if inarguably incorrect. We recommend adopting the Ohio and Utah change to paragraph (b).
- There are some trivial changes that are not worth the time to discuss. For example, Florida has added titles to paragraphs (a) and (b), and Texas has stated them as a single unnumbered sentence.

The following is a clean version of proposed Rule 5.3:

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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;

[38] This is the same in substance to the MR's Comment [2]. Our main concern about the MR version is that its first sentence, if taken out of context, directly contradicts the Rule ("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.").

(b) each lawyer having direct supervisory authority over the nonlawyer 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, 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.

The following is a redline comparison of proposed rule 5.3 to the previous Commission's proposed rule 5.3:

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

(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 the nonlawyer's conduct is compatible with the professional obligations of the lawyer;[39]

[39] These changes track those recommended for Rule 5.1.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

(b) ~~a~~each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;[40] 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;[41] 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, 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]~~ Lawyers often utilize nonlawyer personnel ~~generally employ assistants in their practice~~, including secretaries, investigators, law student interns, and paraprofessionals.[42] 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 ~~the~~ all ethical aspects of their employment~~, particularly regarding the obligation not to disclose confidential information relating to representation of the client~~[43]~~, and should be responsible for their work product~~.[44] 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

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[40] This change also tracks the recommendation for Rule 5.1.

[41] The added language is borrowed from Michigan, as we have recommended with Rule 5.1 in which the same addition also appears.

[42] The phrase that introduces Rule 5.3 describes an obligation that is not limited to a law firm's employees. The first sentence of Comment [1] might be read as being in conflict with the Rule because "employ in their practice", which might be seen as being limited to employees within a law firm. Our recommended change is intended to avoid that misreading. Also, we recommend changing "assistants" to "nonlawyer personnel" in order to track the language of the Rule and avoid possible confusion.

[43] Out of concern that the single example to confidentiality might narrow a reader's vision, we have removed that example in order to broaden the Comment.

[44] It is hard to know what to make of "should" in this sentence. It might be read as meaning that lawyers are required to act as if they are responsible for the work product of nonlawyers, but that would go beyond the Rule in suggesting the lawyer is a guarantor of the conduct of the nonlawyer personnel. We don't see that this language adds any clarity to the Rule, and we therefore recommend that removing it.

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 ~~may~~ might not have legal training.[45]

~~[2] 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 nonlawyers in the firm will act in a way compatible with these Rules and the State Bar Act. See Comment [2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.~~[46]

~~[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer.~~[47]

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

Proposed Rule 1.1 and the recommendation to not adopt any version of MR 1.3 would not substantively change current rule 3-110. Proposed Rule 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:

Proposed Rule 5.2 does not alter the fact that each lawyer is responsible for acting ethically but defines the balance between those responsibilities and a subordinate lawyer's organizational obligation to follow directions. Also, adding a Rule that expresses the subordinate lawyer's obligations should make it easier for a subordinate lawyer to influence the decisions of his or her supervisors.

E. Alternatives Considered:

None.

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[45] Another misuse of "may". I otherwise would retain this Comment, which is identical to the MR version except for the addition of citations to California case law.

[46] This Comment has no counterpart in the MR version, and it adds nothing to the Rule itself other than the unnecessary reference to government legal departments and legal service organizations. We recommend deleting it.

[47] This Comment simply repeats what is not paragraph (c). We recommend that deleting it.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

None.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Kehr
- [Date]: Email Comment

Clopton
- [Date]: Email Comment

Kornberg
- [Date]: Email Comment

Peters
- [Date]: Email Comment

Rothschild
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

[Adopt proposed amended rule 3-110. or No change to current rule.]

Proposed Resolution:

RESOLVED - #1: That the Commission adopts proposed amended Rule 1.1 in the form attached to this Report and Recommendation.

RESOLVED - #2: That the Commission not adopt any form of MR 1.3.

RESOLVED - #3: That the Commission adopts proposed amended Rule 5.1 in the form attached to this Report and Recommendation.

RESOLVED - #4: That the Commission adopts proposed amended Rule 5.2 in the form attached to this Report and Recommendation.

RESOLVED - #5: That the Commission adopts proposed amended Rule 5.3 in the form attached to this Report and Recommendation.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr
Co-Drafters: Clopton, Kornberg, Peters, Rothschild
Meeting Date: September 25-26, 2015

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]