

To: Rules Revision Commission  
From: Commission Staff  
Re: Revisions to Rule 5.1 to conform comments to blackletter of rule approved at September 26, 2015 Meeting Session  
Date: November 9, 2015  
For Consideration at the November 13-14, 2015 Meeting

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During the September 26, 2015 meeting session, the Commission approved amendments to the black letter of proposed Rule 5.1, with the understanding that conforming changes would be made to the Rule's comments before those comments were considered. The changes approved by the Commission are reflected in the attached redline draft 3.1 (11/2/15) of Rule 5.1.

The attached draft 3.1 (11/2/15) also shows suggested conforming changes to the comment, with an explanation for each change. Please review for consideration at the November 13-14, 2015 meeting.

The majority of the drafting team has approved draft 3.1.

Thank you.

**Rule 5.1 Responsibilities of ~~Partners, Managers,~~ Managerial and Supervisory Lawyers<sup>1</sup>**

- (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.<sup>2</sup>
- (b) ~~Each~~ A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,<sup>3</sup> shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.<sup>4</sup>
- (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<sup>5</sup> 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 or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.<sup>6</sup>

**Comment**

*Paragraph (a) – Duties Of ~~Partners and Managers~~ Managerial Lawyers 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.

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<sup>1</sup> Consensus to change title to conform to changes made during 9/26/15 meeting session.

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

<sup>3</sup> 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.

<sup>4</sup> 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."

<sup>5</sup> 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.

<sup>6</sup> 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).

[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~~<sup>a</sup><sup>7</sup> 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~~<sup>managers</sup><sup>8</sup> ~~managerial lawyers~~ to make reasonable efforts to assure that other lawyers in ~~the~~<sup>an</sup><sup>8</sup> agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).

*Paragraph (b) – Duties of Supervisory Lawyers~~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~~<sup>managerial or supervisory lawyer</sup> 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.<sup>9</sup>

[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 lawyer.<sup>10</sup> The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these Rules.

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<sup>7</sup> Substitution of “a” for “each” conforms to Commission’s decision during 9/26/15 meeting session to remove “each” from paragraphs (a) and (b).

<sup>8</sup> Substitute “an” for “the” because this is the first mention that the comment does not apply generally to “law firms” but instead is intended to explain the rule’s application to a public sector or other legal services agency or department.

<sup>9</sup> Should move comment [7] to immediately after comment [5]. It should be under the heading for Paragraph (b) because it explains the application of paragraph (b), not paragraph (c).

<sup>10</sup> Added “lawyer” to distinguish nonlawyer subordinate, responsibility for whom is governed by Rule 5.3.

[9] This Rule does not alter the personal duty of each<sup>11</sup> lawyer in a law firm to comply with the se Rules ~~of Professional Conduct~~ and the State Bar Act.<sup>12</sup> See Rule 5.2(a).

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<sup>11</sup> Retain “each” here. Although “each” lawyer might not be required to take action to assure all lawyers comply with the Rules, (see note 74), under California law, each lawyer has an independent duty to comply with the Rules.

<sup>12</sup> Commission convention to include reference to State Bar Act.