

Rule 5.2 Responsibilities of a Subordinate Lawyer
(Commission's Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 5.2
(No Current Rule)
Responsibilities of a Subordinate Lawyer**

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), ABA Model Rule 5.2 (Responsibilities of a Subordinate Lawyer), and ABA Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”¹ The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

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

¹ The first Discussion paragraph to current rule 3-110 provides:

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

The following is a summary of proposed rule 5.2 (Responsibilities of a Subordinate Lawyer).² This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

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

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

National Background – Adoption of Model Rule 5.2

As California does not presently have a direct counterpart to Model Rule 5.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer,” revised May 5, 2015, is available at:

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

Forty-three jurisdictions have adopted Model Rule 5.2 verbatim.³ Five states have adopted a slightly modified version of Model Rule 5.2.⁴ Three states have not adopted a version of Model Rule 5.2.⁵

² The Executive Summaries for proposed Rules 5.1 and 5.3 are provided separately.

³ The forty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The five states are: Connecticut, Florida, Georgia, Ohio, and Texas.

⁵ The three states are: California, Kentucky, and Virginia.

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

- (a) A lawyer ~~is bound by the Rules of Professional Conduct~~shall comply with these Rules and the State Bar Act notwithstanding that the lawyer ~~acted~~acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if that lawyer acts in accordance with a supervisory ~~lawyer's~~lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

~~[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.~~

~~[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable~~If the subordinate lawyer believes* that the supervisor's proposed resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged. of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

Commission Drafting Team Information

Lead Drafter: Robert Kehr

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

Meeting Dates at which the Rule was Discussed: September 25-26, 2015

Action Summary Approval Date: November 13, 2016

I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 5.2,
from which proposed Rule 5.2 is derived.]**

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

II. COMMISSION RECOMMENDATION AND VOTE

There was consensus among the Commission to recommend a proposed amended rule as set forth below in Section III.

At the Commission's September 25 – 26, 2015 meeting, members present voted yes.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

III. PROPOSED RULE (CLEAN)

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.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

IV. PROPOSED RULE (REDLINE TO MODEL RULE 5.2)

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer ~~is bound by the Rules of Professional Conduct~~shall comply with these Rules and the State Bar Act notwithstanding that the lawyer ~~acted~~acts at the direction of another ~~lawyer or other~~ person.
- (b) A subordinate lawyer does not violate ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if that lawyer acts in accordance with a supervisory ~~lawyer's~~lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

~~[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.~~

~~[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving~~

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

professional judgment as to ~~ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the~~ lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. ~~However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate~~ Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. ~~For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable~~ If the subordinate lawyer believes* that the supervisor's proposed resolution of the question ~~should protect the subordinate professionally if the resolution is subsequently challenged.~~ of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

V. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 9/2/2015:**

C. Rule 3-110: Failing to Act Competently [Model Rules 1.1, 1.3, 5.1, 5.2, and 5.3]

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.

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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

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

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf
- Forty-four jurisdictions have adopted Model Rule 5.2 verbatim.¹ Five jurisdictions have adopted a slightly modified version of Model Rule 5.2.² Two jurisdictions have not adopted a version of Model Rule 5.2.³

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

This Rule is part of an interrelated set of Rules 5.1 – 5.3 that incorporate into separate rules lawyers’ duties to supervise subordinate lawyers and nonlawyer assistants, (Rules 5.1 and 5.3, respectively) as well as expressly setting forth duties of subordinate lawyers (Rule 5.2).

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of standalone rules patterned on Model Rules 5.1, 5.2 and 5.3 rather than maintain a duty of supervision in the competence rule (proposed new Rule 1.1, and currently rule 3-110).
 - o Pros: There are a number of reasons for adopting this change in approach:
 1. Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer’s duties, except the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California’s current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior

¹ The forty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

² The five jurisdictions are: Connecticut, Florida, Georgia, Ohio, and Texas.

³ The three jurisdictions are: California and Virginia.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

lawyer to correct conduct and directions.

2. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in a larger law firm is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?

3. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty imposed on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent, not just to competent representation, but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110.

4. The broader application of Model Rules 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.

5. Model Rule 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. 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. Proposed Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.

7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.

- Cons: In its 9/2/2015 submission to the Commission, OCTC stated that the [current] rule and case law address the duty to supervise attorney staff and employees." In particular, there is abundant case law that sets forth the duties of a subordinate lawyer. See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700]; *In re Aguilar* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]; *Moser v. Bret Harte Union High School District* (E.D. Cal. 2005) 366 Fed.Supp.2d 944.

2. Recommend editing Model Rule 5.2's language to include an obligation to comply with the State Bar Act and to further refine the language to make it declarative and mandatory rather than descriptive.

- Pros: The substitution of "shall comply with" for "is bound by" more clearly signals the mandatory nature of the rule, which is more appropriate in a disciplinary rule. The

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

- other changes conform to the style of other proposed rules.
- Cons: None identified.

3. Recommend editing the Model Rule comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
 - Pros: This conforms to the Commission Charter.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

There were no concepts rejected.

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

There is no current rule that addresses duties of subordinate lawyers. However, proposed Rule 5.2 does not alter the current standard that each lawyer is responsible for acting ethically. Rather, it strikes an appropriate balance between those responsibilities and a subordinate lawyer's organizational obligation to follow directions. Further, including a rule in the Rules of Professional Conduct that expressly states a subordinate lawyer's obligations should, where appropriate, facilitate the ability of a subordinate lawyer to influence the decisions of the subordinate's supervisors.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

VIII. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 5.2 in the form stated above for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the Rule.

IX. DISSENTING POSITION(S)

None.

X. FINAL COMMISSION VOTE/ACTION

Date of Vote: September 25 – 26, 2015

Action: Approve Rule 5.2 as revised during the meeting

Vote: 15 (yes) – 0 (no) – 0 (abstain)