



**THE STATE BAR
OF CALIFORNIA**

OFFICE OF PROFESSIONAL COMPETENCE,
PLANNING, AND DEVELOPMENT

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DATE: September 21, 2009
TO: Members of the Commission for the Revision of the Rules of Professional Conduct
FROM: Randall Difuntorum, Commission Staff Counsel
SUBJECT: 10-day Ballot Circulation of Proposed Rule 5.2

Proposed Rule 5.2 is being distributed for your consideration. The revisions adopted at the Commission's September 11, 2009 meeting have been implemented and approval of parts of the rule submission is being sought through a 10-day ballot procedure. At the meeting, the rule itself was approved but the Chair indicated that the Introduction and the Public Commenter Chart would be handled by a 10-day ballot.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be adopted subject to input received on the Commission's comprehensive Final Report.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 5.2, Draft 6 (9/17/09), is provided as Enclosure 2. A draft dashboard is provided as Enclosure 3. A draft public commenter chart is provided as Enclosure 4.

Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Thursday, October 1, 2009, proposed Rule 5.2 will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

Enclosure 1

Proposed Rule 5.2

(Comparison Chart Showing Changes to Model Rule 5.2)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.2* Responsibilities of a Subordinate Lawyer

September 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 5.2 addresses the responsibilities of a subordinate lawyer and is intended to work in conjunction with Rules 5.1 and 5.3. Paragraph (a) substantially follows Model Rule 5.2(a) in requiring that a subordinate lawyer comply with the rules of professional conduct and the State Bar Act when the lawyer acts under the supervision or direction of another lawyer or other person. Paragraph (b) tracks Model Rule 5.2(b) by providing that a subordinate lawyer who abides by a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility does not violate the Rules or the State Bar Act.

The comments to the Rule have been modified to conform to California rule drafting style, (See, e.g., Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996)), and to more clearly explain a subordinate lawyer's responsibilities when a supervisor has instructed the subordinate to follow a particular course of action.

Although California does not have a comparable rule, the provisions of Rule 5.2 are consistent with existing California law.

Variations in Other Jurisdictions. Rule 5.2 has been adopted in most jurisdictions with the exception of Virginia. Connecticut has deleted paragraph (b) from its rule. New York and Ohio have made minor revisions to the rule.

* Proposed Rule 5.2, Draft 6 (9/17/09).

<p align="center"><u>ABA Model Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 5.2 Responsibilities of a Subordinate Lawyer</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.</p>	<p>(a) A lawyer is bound by the <u>shall comply with these Rules of Professional Conduct and the State Bar Act</u> notwithstanding that the lawyer acted <u>acts</u> at the direction of another <u>lawyer or other</u> person.</p>	<p>Paragraph (a) tracks the Model Rule but replaces the less mandatory phrase "is bound by the" to "shall comply with these" to underscore the affirmative obligation lawyers have to comply with the rules. The rule adds the obligation of California lawyers to also comply with the State Bar Act. The paragraph has been modified to be in the active voice in accordance with California rule drafting style and to make clear that the Rule applies whether the lawyers acts at the direction of another lawyer or other person.</p>
<p>(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.</p>	<p>(b) A subordinate lawyer does not violate the <u>these Rules of Professional Conduct or the State Bar Act</u> if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.</p>	<p>Paragraph (b) tracks the Model Rule but the phrase "the Rules of Professional Conduct" has been replaced with "these Rules and the State Bar Act" to conform to the wording in other rules.</p>

* Rule 5.2, Draft 6 (9/17/09); Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 5.2 Responsibilities a Subordinate Lawyer Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[1] <u>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.</u> Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted<u>acts</u> 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<u>lawyer has violated</u> the Rules <u>or the Act. See Rule 8.4(a).</u> For example, if a subordinate filed<u>signs</u> a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation<u>violate the Rules or the Act</u> unless the subordinate knew<u>knows</u> of the document's frivolous character.</p>	<p>Comment [1] is based on Model Rule 5.2, cmt. [1]. A new first sentence has been added to make clear that the fact a lawyer acts under the supervision of another lawyer does not excuse the subordinate lawyer's failure to comply with the Rules or the State Bar Act. No substantive change is intended. The second sentence tracks the first sentence in the Model Rule comment, except that it has been changed to the active voice in accordance with California rule drafting style. In addition, the sentence has been modified to point out more clearly that the fact a lawyer acts at the direction of a supervisor may be relevant in determining if the lawyer has violated the rules or the State Bar Act, rather than "whether the lawyer had the knowledge required to render conduct a violation of the Rules." A cross reference to proposed Rule 8.4(a), which provides it is professional misconduct to "knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act" has been added. The third sentence has been revised to more clearly state the example in the active voice in accordance with California rule drafting style.</p>
<p>[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</p>	<p>[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<u>lawyers' responsibilities under these Rules or position could not be taken. If the State Bar Act and</u> 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<u>Accordingly, if the subordinate lawyer must comply</u></p>	<p>The first three sentences in the Model Rule comment have been combined into a single sentence to more cogently state that the responsibilities of both the supervisor and the subordinate lawyer under the rule and the State Bar Act are clear and are the same when the issue can reasonably be answered only one way. A new second sentence has been added to affirmatively state that in that situation, the lawyer must comply with the requirements of paragraph (a). The third sentence is a revision of the last three sentences in the Model Rule Comment to more clearly state that where the issue can reasonably be answered in more than one way, the supervisory lawyer may assume responsibility to</p>

<p align="center"><u>ABA Model Rule</u> Rule 5.2 Responsibilities a Subordinate Lawyer Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.2 Responsibilities of a Subordinate Lawyer Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p><u>with his or her obligations under paragraph (a). If the question is reasonably arguable can be answered more than one way, someone has to decide upon the course supervisory lawyer may assume responsibility for determining which of action. That authority ordinarily reposes in the supervisor reasonable alternatives to select, and a the subordinate may be guided accordingly. For example, if a question arises whether If the interests of two clients conflict under Rule 1.7, subordinate lawyer believes that the supervisor's reasonable proposed resolution of the arguable question should protect of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate professionally if the resolution is subsequently challenged obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.</u></p>	<p>determine which of the reasonable alternatives to select. The sentence adds a further requirement that if the subordinate attorney believes that the resolution of the issue would result in a violation of the Rules or the State Bar Act, the subordinate must communicate that position to the supervisory lawyer.</p>

Enclosure 2

Proposed Rule 5.2

Clean Version of Draft 6 (9/17/09)

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

[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. 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 Act. See Rule 8.4(a). For example, if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the Act unless the subordinate knows of the document's frivolous character.

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

Enclosure 3

Proposed Rule 5.2
Draft “Dashboard”

Proposed Rule 5.2 [n/a] “Responsibilities of a Subordinate Lawyer”

(Draft #6, 9/17/09)

Summary: Proposed Rule 5.2 confirms that a subordinate lawyer must comply with the Rules of Professional Conduct and State Bar Act notwithstanding that the subordinate is acting under the direction of a supervisory lawyer and provides guidance to subordinates in those situations.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 1

Abstain 1

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Representatives from the California Public Defenders Association and various Public Defender offices in California. See Public Comment Chart for a complete list of commenters.

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Representatives from the California Public Defenders Association and various Public Defender offices in California expressed concerns that adoption of proposed Rule 5.2 could result in subordinate lawyers not following the direction of supervisory lawyers, even in situations where the supervisor's decision is a reasonable resolution of an arguable question of professional duty. Please see Public Comment Chart for Commission response to their concerns.

Not Controversial

Enclosure 4

Proposed Rule 5.2
(Public Commenter Chart)

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
8	Boxer, Doreen	D	Public Defender, San Bernardino County		If the Chief Defender can't manage the caseload because of the Rule, there will be a definite negative impact on county public defenders.	To address this issue, the Commission revised the comments to proposed Rule 5.1 to clarify the obligations of, and interrelationship among, management lawyers and to add a reference to the State Bar's "Guidelines on Indigent Defense Services Delivery Systems". The Commission specifically added to proposed Rule 5.1, new Comment [5] to clarify the respective roles of intermediate managers and higher level attorney managers.
9	Chandler, Timothy A.	D	Alternate Public Defender, San Diego County		The proposed Rule will have the unwanted effect of pitting one lawyer against another and the resultant denial of responsibility could lead to chaos.	To address this issue, the Commission revised the comments to proposed Rule 5.1 to clarify the obligations of, and interrelationship among, management lawyers and to add a reference to the State Bar's "Guidelines on Indigent Defense Services Delivery Systems". The Commission specifically added to proposed Rule 5.1 new Comment [5] to clarify the respective roles of intermediate managers and higher level attorney managers. See also Comment [6] to proposed Rule 5.1.
2	COPRAC	A			Support as drafted, the proposed rule strikes a balance to address a common issue that arises between lawyer supervisors and subordinates.	No action necessary

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Judge, Michael	D	Public Defender, Los Angeles County, California; Council of Chief Defenders; & California Public Defenders' Association		The responsibility for rejecting cases should be that of the Chief Defender, not an individual deputy defender. Adoption of the proposed rule should not include adoption of ABA Formal Opn. 06 441.	To address this issue, the Commission revised the comments to proposed Rule 5.1 to clarify the obligations of, and interrelationship among, management lawyers and to add a reference to the State Bar's "Guidelines on Indigent Defense Services Delivery Systems" The Commission specifically added to proposed Rule 5.1 new Comment [5] to clarify the respective roles of intermediate managers and higher level attorney managers.
1	Los Angeles County Bar Association	D			The proposed Rule undermines the important standard of personal accountability imposed by the current rules by creating a Nuremberg-like defense to claims of misconduct	The Commission disagreed, in part, because this Model Rule has been adopted in a majority of states and the Commission is not aware of any evidence of abrogated accountability on the part of subordinate lawyers. In addition, Cmt. [1] expressly states that the fact that a lawyer is under the supervision of another lawyer does not excuse the subordinate lawyer from the obligation to comply with the Rules.
4	Orange County Bar Association	A			It is important to provide guidance to a subordinate lawyer who might be asked to act in a manner that may be unethical.	No action needed.
5	San Diego County Bar Association	A			Support as drafted	No action needed.
3	San Francisco, Bar Association of	M			While the concept of proposed Rule 5.2 is implicit in California's current rules, adoption	No action needed.

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of the ABA's explicit rule is helpful. In Comment [2], the phrase "the supervisory lawyer" should be changed to "a supervisory lawyer"	The Commission did not make the requested revision because the definite article "the" is the appropriate term given the prior references in the comment to a specific subordinate – supervisor relationship.
7	Windom, Gary	D	Public Defender, Riverside County; California Public Defenders' Association ; & California Council of Chief Defenders		It is the Chief Defender's responsibility to declare unavailability or an overload of assigned cases; diluting the Chief Defender's authority might have a chilling effect on management's interest in mentoring new deputies. Adoption of the proposed Rule should not include adoption of ABA Formal Opn. 06 441.	To address this issue of concern, the Commission revised the comments to proposed Rule 5.1 to clarify the obligations of, and interrelationship among, management lawyers and to add a reference to the State Bar's "Guidelines on Indigent Defense Services Delivery Systems". The Commission specifically added to proposed Rule 5.1 new Comment [5] to clarify the respective roles of intermediate managers and higher level attorney managers