

**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.”<sup>1</sup> 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.

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<sup>1</sup> 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).<sup>2</sup> 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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf)

Forty-three jurisdictions have adopted Model Rule 5.2 verbatim.<sup>3</sup> Five states have adopted a slightly modified version of Model Rule 5.2.<sup>4</sup> Three states have not adopted a version of Model Rule 5.2.<sup>5</sup>

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<sup>2</sup> The Executive Summaries for proposed Rules 5.1 and 5.3 are provided separately.

<sup>3</sup> 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.

<sup>4</sup> The five states are: Connecticut, Florida, Georgia, Ohio, and Texas.

<sup>5</sup> 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 reasonableIf 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.