

Proposed Rule 5.1 [RPC N/A] “Responsibilities of Partners, Managers, and Supervisory Lawyers”

(Draft #10, 9/13/09)

Summary: Proposed Rule 5.1 imposes a duty on partners, lawyers with comparable managerial authority and lawyers who directly supervise other lawyers to oversee the conduct of lawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of *respondeat superior* is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by firm lawyers, orders or ratifies the misconduct of another lawyer, or has knowledge of the other lawyer’s misconduct and fails to take steps to prevent or mitigate the consequences.

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

Rules	RPC 3-110, Discussion
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 Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 3

Abstain 0

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:

The California Public Defenders Association, California Council of Chief Defenders and several District Attorney and Public Defender offices in California. See Public Comment Chart for a complete list of commenters.

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The California Public Defenders Association and several District Attorney and Public Defender offices in California expressed concerns that adoption of proposed Rule 5.1 could result in the imposition of vicarious responsibility on experienced lawyers in the office who informally take on the mentoring of recent hires. They also argue that adoption of the Rule would discourage such mentoring, which is critical in the training of new lawyers. See Public Comment Chart for Commission responses to their expressed concerns.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.1* Responsibilities of Partners, Managers, and Supervisory Lawyers

October 2009

(Draft rule following initial round of public comment.)

INTRODUCTION:

Proposed Rule 5.1, which substantially tracks Model Rule 5.1, imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers, to oversee the conduct of lawyers within a law firm or other organization, including corporate and government legal departments, and legal services organizations. The Rule does not impose vicarious liability, i.e., the doctrine of *respondeat superior* is not applicable. Rather, a supervising lawyer is subject to discipline only if the lawyer fails to make reasonable efforts to ensure compliance with the Rules by firm lawyers, orders or ratifies the misconduct of another lawyer, or has knowledge of the other lawyer's misconduct and fails to take steps to prevent or mitigate the consequences.

Paragraph (a) of the rule imposes a duty on a lawyer who is a partner or who, individually or with other lawyers, possesses comparable managerial authority to make reasonable efforts to establish measures to ensure compliance with the rules of professional conduct. Paragraph (b) imposes a duty on a lawyer, whether or not a partner or a manager, who has direct supervisory responsibility over another lawyer to make reasonable efforts to ensure the other lawyer complies with the rules. Under paragraph (c)(1) any lawyer may be held responsible in discipline for another lawyer's ethical violation if the lawyer orders or ratifies the misconduct. Under paragraph (c)(2), a lawyer who is a partner, manager or direct supervisor of the offending lawyer, may be subject to discipline for the other lawyer's misconduct if the lawyer has knowledge of it at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.

* Proposed Rule, Draft 10 (9/13/09).

INTRODUCTION (Continued):

Current California Law and Variations in Other Jurisdictions. Model Rule 5.1 is the rule in nearly every jurisdiction, with only minor variations. For example, both Illinois and New Hampshire impose Rule 5.1's duties on "each" managing partner, in effect preventing such managerial partners from delegating responsibility to a single managing partner. New York and New Jersey both provide for discipline of a law firm, in addition to the individual lawyers in the firm, under Rule 5.1. All jurisdictions have adopted some version of Model Rule 5.1(c). California does not have a counterpart to Rule 5.1. However, the Discussion to current rule 3-110 provides that the duties set forth in the rule include the duty to supervise the work of subordinate lawyers and non-lawyer employees and agents. Proposed Rule 5.1 establishes in a separate rule the principle of supervisory responsibility and is consistent with existing California case law.

Minority. A minority of the Commission views proposed Rule 5.1 as an overly ambitious rule that represents a serious departure from the traditional notion of viewing compliance with ethical rules as the personal responsibility of individual lawyers, instead effectively imposing a strict liability standard on lawyers who did not engage in misconduct. The minority takes the position that the Rule unfairly imposes collective guilt on innocent lawyers in a firm for violations of the Rules of Professional Conduct by other lawyers, without adequately describing in advance what conduct will fall within its proscriptions and without clearly delineating which management or supervisory lawyers will be subject to the Rule. Specifically, the minority opposes the Rule because the Rule: (1) imposes discipline for negligent conduct contrary to the Supreme Court's admonition that the disciplinary system should not be used to punish acts of negligence; (2) fails to articulate specific, definable or consistent standards for enforcement, and as result, is unconstitutionally vague; and (3) fails to give notice as to which lawyers in a law firm are subject to its requirements because the phrase "comparable managerial authority" is vague and undefined.

A detailed statement of the minority's position, with citation to authority, is provided in these materials after the Comment Comparison Chart, below. See Minority Dissent.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A partner in a law firm, and 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 conform to the Rules of Professional Conduct.</p>	<p>(a) A partner in a law firm, and 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 conform to <u>comply with the these</u> Rules of Professional Conduct <u>and the State Bar Act</u>.</p>	<p><u>Paragraph (a)</u> is identical to Model Rule 5.1(a) except for replacing "conform to" with "complies with" for to clarify that the provision is mandatory. No change in meaning is intended.</p> <p>In addition, "these Rules" has been substituted for "the Rules of Professional Conduct" because the former is the standard term used throughout the Rules.</p>
<p>(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.</p>	<p>(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to <u>complies with the these</u> Rules of Professional Conduct <u>and the State Bar Act</u>.</p>	<p><u>Paragraph (b)</u> is identical to Model Rule 5.1(b) with the exception of the same change as in paragraph (a). Again, no change in meaning is intended.</p>
<p>(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:</p>	<p>(c) A lawyer shall be responsible for another lawyer's violation of the these Rules of Professional Conduct <u>and the State Bar Act</u> if:</p>	<p><u>Paragraph (c)</u>. The introductory clause to paragraph (c) is identical to Model Rule 5.1(c).</p>
<p>(1) the lawyer orders or, with [knowledge] of the specific conduct, ratifies the conduct involved; or</p>	<p>(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or</p>	<p><u>Subparagraph (c)(1)</u> is identical to Model Rule 5.1(c)(1).</p>

* Proposed Rule, Draft 10 (9/13/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.</p>	<p>(2) the lawyer is a partner, or <u>individually or together with other lawyers</u> has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.</p>	<p><u>Subparagraph (c)(2)</u> is identical to Model Rule (c)(2) except it has been changed to conform the wording with the language in paragraph (a). This additional language clarifies that the responsibility to take reasonable remedial action under this paragraph applies when the lawyer is a partner or, individually or together with other lawyers, has comparable managerial authority.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.</p>	<p><u><i>Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.</i></u></p> <p>[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a <u>law</u> firm. See Rule 1.0.1 (<u>Law Firm definition</u>).</p>	<p>Headings have been added to separate the comments pertaining to the three paragraphs under the rule.</p> <p>The second sentence in Model Rule Comment [1] has been deleted because not all partners in law firms today are equity partners exercising managerial or supervisory authority over lawyers, particularly those lawyers with whom they do not regularly collaborate. The first sentence and the reference to the definition of law firm in rule 1.0.1 sufficiently identifies lawyers with managerial authority under the rule.</p>
<p>[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. 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.</p>	<p>[2] Paragraph (a) requires lawyers with managerial authority within a <u>law</u> firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the <u>law</u> firm will <u>comply with these Rules and the State Bar Act</u>. 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.</p>	<p>Comment [2] is based on Model Rule 5.1, Cmt. [2]. The Commission recommends several changes to conform to non-substantive language changes in paragraph (a).</p> <p>The word “law” has been added as a modifier of “firm” because “law firm” is a defined term in these Rules.</p>

* Proposed Rule, Draft 10 (9/13/2009). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers 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).</p>	<p>Comment [3] is has no counterpart in the Model Rule. It clarifies that the duty of lawyers with managerial authority to make reasonable efforts to have measures in place to ensure conformity with the rules applies to internal policies and procedures affecting lawyer compensation and career development that might induce a violation of the rules.</p>
<p>[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.</p>	<p>[4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may 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.</p>	<p>Comment [4] is a revised and more succinct version of Model Rule 5.1, Cmt. [3]. No change in meaning is intended.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[5] 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 of an enterprise or a governmental agency, may 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 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.</p>	<p>Comment [5] has no counterpart in the Model Rule. It is included to clarify that paragraph(a) does not apply to every lawyer with intermediate managerial responsibilities where the organization has a designated managing lawyer or committee or other body with appropriate managerial authority and is charged with the responsibilities under paragraph (a). Comment [5] was added to address concerns raised by lawyers practicing in public offices that adopting the Model Rule without further clarification would deter mid-level managers in such offices from engaging in the kind of informal mentoring that is critical to a subordinate lawyer's development in that environment.</p> <p>The comment further clarifies that a lawyer with intermediate responsibilities continues to be responsible to take corrective measures if the lawyer knows or reasonably should know that the person or body with managerial authority is not complying with the requirements of the rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[6] 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. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).</p>	<p>Comment [6] has no counterpart in the Model Rule. It clarifies that the duties under paragraph (a) apply to lawyers in charge of public sector legal agencies, such as a public defender, and head of corporate legal departments. Similar to Comment [5], Comment [6] was added to address concerns raised by public defenders that adoption of the Model Rule language without clarification would undermine the ability of managing lawyers in those organizations to make effective use of available resources. Of particular concern to these managing lawyers was a recently-issued ABA Ethics Opinion that conflicts with the principles set forth in the State Bar's Guidelines, cited in Comment [6]. See ABA Formal Ethics Op. 06-441 (5/13/06) ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation").</p> <p>The second sentence of Comment [6] has been added to make it clear that reasonable guidelines relating to case assignments and distribution of work among lawyers in the organization will satisfy the requirements of the rule.</p>
	<p>[7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].</p>	<p>Comment [7] has no counterpart in the Model Rule. It clarifies that the conduct of a lawyer with intermediate managerial responsibilities in a public sector legal agency or law department is governed by paragraph (b) and not paragraph (a) of the rule. See also Explanation of Changes for proposed Comments [5] and [6].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><i><u>Paragraph (b) – Duties of Lawyer as Supervisor</u></i></p> <p><u>[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. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.</u></p>	<p>Comment [8] has no counterpart in the Model Rule. It is intended to distinguish between those lawyers in a law firm who have responsibilities as direct supervisors under paragraph (b) of the rule from those with managerial responsibilities under paragraph (a). The Comment also points out that paragraph (b) applies to supervising attorneys who are inside as well as outside of the law firm. The Model Rule does not have a separate comment on the duties of a lawyer under paragraph (b) of the rule.</p>
	<p><u>[9] A lawyer with supervisory responsibility over another lawyer has an obligation to 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.</u></p>	<p>Comment [9] has no counterpart in the Model Rule. It expands on the last sentence in Model Rule 5.1, Cmt. [2].</p>
	<p><u>[10] 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.</u></p>	<p>Comment [10] has no counterpart in the Model Rule. It is intended to provide further guidance on when a lawyer has direct supervisory responsibilities under paragraph (b) of the rule. The first sentence is the second sentence from Model Rule 5.1, Cmt. [5], and is included in this comment because it pertains to paragraph (b).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).</p>	<p><u>Paragraph (c) – Responsibility for Another's Lawyer's Violation</u></p>	<p>Model Rule 5.1, Cmt. [4] has been replaced with the heading to the comments regarding paragraph (c) of the rule. See also proposed Comment [14].</p>
	<p><u>[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.</u></p>	<p>Comment [11] is new and is intended to explain the scope of paragraph (c)(1). The Model Rule does not have a separate comment regarding paragraph (c)(1) of the rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor 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.</p>	<p>[12] <u>Under paragraph</u> (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, <u>and</u> a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, <u>may be responsible</u> for the <u>conduct</u> of the <u>other lawyer, whether or not the other lawyer is a member or employee of the law firm.</u> Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor 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 <u>consistent with the lawyers' duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).</u></p>	<p>Comment [12] is based on Model Rule 5.1, Cmt. [5] and is intended to capture the concept that paragraph (c)(2) applies to both partners and other lawyers with managerial authority in a law firm and lawyers who have direct supervisory authority. The comment also clarifies that the rule applies whether or not the lawyer is a member or employee of the firm.</p> <p>Grammatical changes have been made for clarity without changing the substance of the comment.</p> <p>The final sentence has been added as a reminder that corrective action required by the rule should be consistent with the lawyer's duties under Business and Professions Code section 6068(e).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.</p>	<p>[13] A supervisory lawyer may violate 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.</p>	<p>Comment [13] is based on Model Rule 5.1, Cmt. [6]. However, it has been rewritten so that its concept is more clearly stated, i.e., even if a lawyer does not violate paragraph (c) because the lawyer neither ordered or ratified a subordinate lawyer's conduct, or failed to avoid or mitigate the known consequences of the conduct, the lawyer acting as direct supervisor may nevertheless violate paragraph (b).</p>
<p>[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.</p>	<p>[14] 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. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.</p>	<p>Comment [14] is based on Model Rule 5.1, Cmt. [7]. The Model Rule comment has been expanded to make it clear that the obligations under paragraphs (a), (b) and (c) of the Rule provide independent bases for discipline and do not impose vicarious responsibility for the acts of another attorney.</p>
<p>[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).</p>	<p>[15] 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).</p>	<p>Comment [15] is based on Model Rule 5.1, Cmt. [8]. No change in meaning is intended by the clarifying revisions.</p>

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) A partner in a law firm, and 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 ~~assurances~~assurance that all lawyers in the firm ~~conform to the~~ comply with these Rules ~~of Professional Conduct and the State Bar Act.~~
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer ~~conforms to the Rules of Professional Conduct~~complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of ~~the~~these Rules ~~of Professional Conduct and the State Bar Act~~ if:
- (1) the lawyer orders or, with knowledge 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, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- [1] Paragraph (a) ~~is intended to apply~~applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition). ~~This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a law firm. Paragraph (b) is intended to apply to lawyers who have supervisory authority over the work of other lawyers in a firm. Paragraph (c) is intended to impose personal responsibility on a lawyer for the acts of another lawyer in the law firm. See also Rule 8.4(a). Paragraphs (a), (b) and (c) of this Rule create independent bases for discipline.~~
- [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 all lawyers in the law firm will ~~conform to the~~ comply with these Rules ~~of Professional Conduct and the State Bar Act.~~ Such policies and procedures include, ~~for example,~~ 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.
- [3] ~~Paragraphs~~Paragraph (a) ~~and (b) are~~is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that

COMMENT

Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.

may induce a violation of these Rules and the State Bar Act. See Rule ~~2.1~~ and Rule 8.4(a).

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

[5] 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 of an enterprise or a governmental agency, may 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 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.

[6] 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. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).

[7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].

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. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.

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

[10] 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.

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.

[12] 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 ~~vicariously~~ responsible for the conduct of the other lawyer. ~~Whether a, whether or not the other~~ lawyer ~~has supervisory authority in particular circumstances~~ is a ~~question~~ member or employee of fact the law firm. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, ~~both~~ the supervisor ~~and~~ well as the subordinate ~~have~~ has a duty to correct the resulting misapprehension ~~the resulting misapprehension if doing so is~~ consistent with the ~~lawyer's~~ lawyers' duty not to disclose confidential information under Business ~~&~~ and Professions Code section 6068, subdivision (e)(1).

~~[5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the~~ 13 A supervisory lawyer may violate paragraph (b) by failing to make the efforts required under that paragraph, even ~~though it if the lawyer~~ does not ~~entail a violation of~~ violate paragraph (c) ~~because there was no direction, ratification by knowingly directing or knowledge of ratifying the violation conduct, or where feasible, failing to take reasonable remedial action.~~

[614] ~~Apart from~~ 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. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[715] This Rule is ~~does~~ not ~~intended to~~ 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 3-110 Failing to Act Competently Responsibilities of Partners, Managers, and Supervisory Lawyers

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) A partner in a law firm, and 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.
- (b) A lawyer having direct supervisory authority over another lawyer 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 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, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

~~(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]; *Crano 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. (Amended by order of Supreme Court, operative September 14, 1992.)~~

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 (Law Firm definition).
- [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 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.
- [3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers 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).
- [4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may 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.
- [5] 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 of an enterprise or a governmental agency, may 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 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.

- [6] 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. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).
- [7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See comments [5] and [8].

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. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) also applies to lawyers who have intermediate

managerial responsibilities in public sector legal agencies and law departments.

- [9] A lawyer with supervisory responsibility over another lawyer has an obligation to 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.
- [10] 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.

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.
- [12] 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 remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor 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).

- [13] A supervisory lawyer may violate 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.
- [14] 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. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
- [15] 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).

Proposed Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers Rules Revision Commission – Minority Dissent

1. Rule 5.1 Unfairly Imposes Disciplinary Liability On Innocent Lawyers For The Misdeeds And Culpable Misconduct Of Other Lawyers.

Rule 5.1 represents a serious departure from the traditional notion of viewing compliance with ethical rules as the personal responsibility of individual lawyers and unfairly imposes collective guilt on innocent lawyers in a firm for violations of the Rules of Professional Conduct of other lawyers without describing in advance what conduct will fall within its proscriptions and without clearly delineating which management or supervisory lawyers will be subject to the Rule.

In general, the Rule blurs the lines between the entity and its individual constituents. Partnerships and corporations are created precisely so as to create a separate entity from its constituents. But the Rule for all practical purposes potentially imputes the conduct of an individual culpable lawyer to the entity, and then effectively imputes the wrongdoing lawyer's conduct to its innocent constituents. This has been done because the Rules were not designed to impose discipline on law firms.

However, regulating law firms through their constituent lawyers is the wrong approach.

Paragraph (a) requires that partners in a law firm, which is defined to include lawyers with “comparable

managerial authority” in corporate law departments and public agencies, “make *reasonable efforts* to ensure that the firm has in effect measures giving *reasonable assurance* that all lawyers in the firm comply with the Rules of Professional Conduct.” Paragraph (b) provides that a “lawyer having direct supervisory authority over another lawyer shall make *reasonable efforts* to ensure that the other lawyer complies with the Rules of Professional Conduct.”

Paragraphs (a) and (b) are in stark contrast to accepted notions of derivative liability found in tort law where liability is only imposed on a person for the tortious conduct of another if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement or (b) gives substantial assistance in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846, citing, Rest.2d Torts, § 876. See also *Casey v. United States Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1146 (“a defendant can only aid and abet another's tort if the defendant knows what that tort is”).

Similarly, under criminal law a person who aids and abets the commission of a crime must have (1) knowledge of the unlawful purpose of the perpetrator and (2) act with the intent of committing, encouraging, or facilitating the

commission of the offense. *People v. Beeman* (1984) 35 Cal.3d 547, 554-555.

In contrast, Paragraphs (a) and (b) contain no knowledge or scienter requirement, and as explained below, operate to impose discipline *ex post facto*.

2. **Rule 5.1 Imposes Discipline For Negligent Conduct Contrary To The Supreme Court's Admonition That The Disciplinary System Should Not Be Used To Punish Acts Of Negligence.**

The Rule as a whole is structured so that innocent lawyers in a law firm will be disciplined for negligence. Rather than imposing discipline for intentional or knowing conduct, Rule 5.1 imposes discipline on lawyers for negligence by embracing what are essentially tort standards--"reasonable efforts" and "reasonable assurance" that another lawyer will comply with the Rules of Professional Conduct. However, the Supreme Court has rejected the concept that lawyers should be disciplined for negligence or mistakes in judgment. As the Supreme Court has noted: "This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." *Lewis v. State Bar* (1981) 23 Cal.3d 683, 688.

Worse yet, the Rule imposes discipline on lawyers merely for their perceived managerial authority because of their *status* as partners. The Rule approaches strict

liability by bringing within its scope not only lawyers with actual managerial authority, but also lawyers who "individually or together with other lawyers" possess what the Rule characterizes as "comparable managerial authority."

3. **The Rule Fails To Articulate Specific, Definable Or Consistent Standards For Enforcement, And As Result, Is Unconstitutionally Vague.**

Paragraphs (a) and (b) do not tell lawyers *before the fact* what measures or firm policies will run afoul of the Rule or what policies should be implemented to prevent violations of other rules. Paragraph (a) provides no standards to guide lawyers as to what "reasonable efforts" should be taken, or what "measures" should be in place that would "give reasonable assurance" that other lawyers comply with an endless number of Rules and ways in which the Rules may be violated. Once there is an underlying violation of a Rule, innocent lawyers in a firm will be blamed for failing to implement measures that would have prevented the violation by the culpable lawyer. The Rule is inherently hindsight-driven.

Similarly, paragraph (b) offers no guidance to supervisory lawyers as to what "reasonable efforts" are sufficient to ensure that a supervised lawyer complies with the Rules of Professional Conduct.

Paragraphs (a) and (b) purport to tell lawyers to abide by a standard of care, without defining what that standard is. Paragraphs (a) and (b), by imposing "reasonable efforts" or "reasonable assurances," effectively require proof of

breach of an unstated *standard of care*—which must be proved by expert testimony, essentially converting a State Bar proceeding into a claim for legal malpractice. Proof of a violation will turn on a “swearing contest” between experts testifying on questions of law practice management—i.e., as to whether a violation of a given Rule by a given lawyer could have been prevented by supposed “reasonable efforts” of other individual lawyers in firm—all with the benefit of hindsight.

Because proof of a violation will turn on undefined and unarticulated standards of care, rather than articulated and objective standards, the Rule will invite State Bar prosecutors to engage in post hoc second-guessing of firm policies and procedures to establish the causation element that paragraphs (a) and (b) necessarily implicates. In looking for violations, a State Bar prosecutor can “audit” the firm’s practices to find areas where the firm did not have appropriate preventive measures and file charges against individual lawyers for what are perceived to be the “bad practices” of the firm.

In fact, a violation can be charged under paragraphs (a) and (b) of Rule 5.1 even where there has been no underlying misconduct or violation of any Rule by a subordinate or other lawyer. By analogy, the Supreme Court has rejected attempts to impose liability for abstract negligence where there has been no proof of a causal nexus between the conduct and the injury—i.e., “abstract negligence” or “negligence in the air.” *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 773 (“abstract negligence,” without proof of a causal connection between the defendant’s breach and the

plaintiff’s injury, is insufficient); *Noble v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912 (classic example of abstract negligence where property owner’s security did not comport with plaintiffs’ expert’s notion of “adequacy,” but whether there was no proof of any causal connection between that negligence and the injury.) Similarly, paragraphs (a) and (b) allow the State Bar to bring disciplinary charges against lawyers for abstract negligence where there has been no underlying predicate violation of another Rule by a subordinate or other lawyer.

By failing to articulate specifically tailored regulatory standards, paragraphs (a) and (b) are unconstitutionally vague. To avoid a vagueness challenge a statute or regulation must be sufficiently clear so as to give a fair warning of the conduct prohibited, and to provide a standard against which conduct can be uniformly judged by courts. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109. To pass constitutional muster, a rule or statute must be sufficiently definite to provide adequate notice of the conduct proscribed and must provide sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107.

4. The Rule Also Fails To Give Notice As To Which Lawyers In A Law Firm Are Subject To Its Requirements Since The Phrase "Comparable Managerial Authority" Is Vague And Undefined.

Rule 5.1 is aimed at partners in a law firm, and lawyers who possess "comparable managerial authority" in a law firm, as that term is used in paragraphs (a) and (c)(2). However, this term is inherently vague and over broad.

First, because the definition of "law firm" in Rule 1.0.1 broadly includes not only private law partnerships and law corporations, but also government entities and corporate legal departments, the attempt to analogize law partnerships to government lawyers and corporate legal departments is misplaced. Government offices and corporate legal departments are not operated like partnerships. Transmuting a "partnership model" to government agencies makes no sense. This is especially true with respect to government agencies in which managerial authority may be vested in an elected official. As an elected official, the head of a public office may have greater obligations to the public at large that override the objectives of Rule 5.1. For example, if caseloads of public defenders or deputy district attorneys are excessively high due to budget cuts such that those attorneys cannot adequately perform their professional responsibilities to clients, the Rule would mandate that lawyer supervisors, including heads of public defenders' offices and elected district attorneys, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently

handled. (See ABA Formal Opinion 06-441.) It is questionable, given the separation of powers doctrine, whether the State Bar and the Supreme Court can dictate to public officials facing severe budget cuts that they must reduce work loads by hiring more attorneys, while ignoring the corresponding costs to the public and taxpayers. (Comment [6] attempts to address the issue, but raises more questions than it answers.)

Second, even as applied to private law firms, the term "comparable management authority" is hopelessly vague and reaches partners who have no management authority. The reality today is that even lawyers who have the title of "partner" frequently have no management role in the firm and are more like employees than owners of the firm. *Smith v. Diner* (7th Cir. 2006) 453 F.3d 971 ("Someone can be called a 'partner,' for example, yet in fact lack any authority to make decisions for the firm; he might be just as much at the mercy of those who really run the firm as a clerk would be."); *EEOC v. Sidley Austin Brown & Wood* (7th Cir. 2002) 315 F.3d 696 (partners may be deemed "employees" where they lack any meaningful control over the firm's affairs).

Comment [5] attempts to address this problem by suggesting that lawyers with "intermediate managerial responsibilities" "may not" be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer or a management committee. However, by stating that the Rule "may not" apply to certain lawyers, Comment [5] fails to resolve the underlying uncertainty and only serves to highlight the

fact that the term "comparable managerial authority" is vague and undefined. In fact, Comments [5] and [7] are inconsistent in that the latter states (as an exception not found in the Rule itself) that "Paragraph (a) *does not apply* to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments."

Paragraph (b) is similarly unclear as to which lawyers have "direct supervisory authority." In theory, all partners in a law firm have "direct supervisory authority" over all subordinate lawyers in the firm. The Rule fails to limit its scope to the supervision by a *specific* partner over a *specific* subordinate lawyer concerning a *specific* case.

Paragraph (b) is thus overly broad in its potential to reach innocent lawyers.

Finally, the inherent problems with this overly ambitious Rule are illustrated by the large number of comments that accompany it (15 comments, twice the number in the ABA Model Rule). Rather than adding clarity to the Rule, the comments merely expose its flaws.

In conclusion, the deficiencies in the Rule unfairly operate to impose disciplinary liability on innocent lawyers by invoking what amounts to a strict liability standard. It is an overly broad, shotgun approach to regulation.

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
(Commission's Proposed Rule – Clean Version)

- (a) A partner in a law firm, and 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.
 - [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1 (Law Firm definition).
 - [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 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.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
 - [3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers 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).
- (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 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, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
 - [4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may 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.
 - [5] 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 of an enterprise or a governmental

COMMENT

Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.

agency, may 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 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.

- [6] 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. The creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in the agency or department are examples of the kind of measures contemplated by the Rule. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).
- [7] Paragraph (a) does not apply to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments. See Comments [5] and [8].

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. Paragraph (b) applies to all supervisory lawyers including lawyers who are not partners in a partnership or shareholders in a professional law corporation.

Paragraph (b) also applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.

- [9] A lawyer with supervisory responsibility over another lawyer has an obligation to 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.
- [10] 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.

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.
- [12] 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 remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor 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 Rule 1.6 and Business and Professions Code section 6068(e).

- [13] A supervisory lawyer may violate 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.
- [14] 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. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.
- [15] 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, and Supervisory Lawyers

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no counterpart to Rule 5.1.

District of Columbia: Rule 5.1 substantially tracks the Model Rule.

Illinois provides that “[e]ach” partner or lawyer shall make the reasonable efforts specified in Rule 5.1(a) and (b).

New Hampshire Rules 5.1(a) and (b) impose duties on “each” partner in a firm, “each” lawyer with comparable managerial authority, and “each” lawyer with direct supervisory authority. A New Hampshire Comment explains that the change “is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others.”

New Jersey begins Rule 5.1 (a) with: “Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction ...n instead of “A partner in a law firm.” Rule 5.1(c)(2) applies only to lawyers having “direct supervisory authority”; it deletes “is a partner or has comparable managerial authority in the law firm in which the other lawyer practices.”

New York: New York's DR 1-104 imposes like duties on supervisory lawyers and partners but goes further and imposes duties on law firms as entities, as follows:

A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

Oregon: Rule 5.1 deletes the language of ABA Model Rules 5.1(a) and (b), but adopts ABA Model Rule 5.1(c) verbatim.

Texas: The text of Texas Rule 5.01 has no equivalent to ABA Model Rules 5.1(a) and (b), but Comment 6 to Texas Rule 5.01 provides:

Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm or government agency or over another lawyer should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the office conform to these rules. This moral obligation, although not required by these rules, should fall also upon lawyers who have intermediate managerial responsibilities in the law department of an organization or government agency.

Texas Rule 5.01(b), which is similar to ABA Model Rule 5.1(c)(2), also applies to “the general counsel of a government agency's legal department.”

**Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers.
[Sorted by Commenter]**

TOTAL = 9 **Agree = 0**
Disagree = 5
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Burdge, Richard J. Jr.	M	Howrey, LLP		The Rule should be modified to clarify the duty to supervise law firm colleagues who are not in California branches of the firm. other states may have different Rules and render compliance problematic	Commission revised the comments to the Rule to clarify the obligations of, and interrelationship among, management lawyers
2	Judge, Michael	D	Public Defender, Los Angeles County, California; Council of Chief Defenders; & California Public Defenders' Association		The term "supervisor" as used in the rules is vague. The Rule should clearly identify who is accountable and in the case of public defenders; the Rule should specify that the Chief Defender is the one responsible. The Rule should not follow ABA Opn.# 06 441 where an individual defender would be required to tell the judge and client that he/she lacks the time and resources necessary to competently represent clients.	Commission revised the comments to the Rule 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". See Comment [6]. Commission specifically added new Comment [5] to clarify the respective roles of intermediate managers and higher level attorney managers. See also Comment [6].
3	Los Angeles County Bar Association	D			The Rule should not create a situation where each lawyer can accuse another and deny fundamental personal accountability.	Commission revised the comments to the Rule to clarify the obligations of, and interrelationship among, management lawyers.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers.
[Sorted by Commenter]**

TOTAL = 9 **Agree = 0**
Disagree = 5
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Los Angeles County District Attorney of Los Angeles County - Steve Cooley	D			<p>The proposed Rule goes too far in imposing vicarious responsibility on a supervisor for acts that are not condoned or approved by that supervisor.</p> <p>The imposition of vicarious liability is disturbing given the limited guidance provided by the Rule on the concept of “direct supervisory authority”.</p> <p>As drafted, it creates exposure for deputy DA’s who are not regarded as actual managers.</p> <p>The effect of the Rule will be to discourage consultation among junior and senior attorneys and less attorneys will volunteer to serve in the office’s Professional Responsibility Unit.</p>	<p>The Commenter has misinterpreted the Rule. The Rule does not impose vicarious responsibility for the acts of a subordinate lawyer. Paragraph (c) requires that the supervisory lawyer have knowledge of the subordinate lawyer’s prohibited conduct.</p> <p>Commission revised the comments to the Rule to clarify the obligations of, and interrelationship among, management lawyers. See Comments [5] and [6].</p> <p>See also Response to Public Comment of Michael Judge.</p>
5	San Bernardino County Public Defender	D			<p>The Rule may undermine the delivery of indigent defense services.</p>	<p>Commission added a reference to the State Bar’s “Guidelines on Indigent Defense Services Delivery Systems”. See Comment [6].</p> <p>See also Response to Public Comment of Michael Judge.</p>
6	San Diego County Bar Association	M			<p>In Comment [4], there is a redundant phrase that may be deleted.</p>	<p>Commission implemented suggested revision.</p>

**Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers.
[Sorted by Commenter]**

TOTAL = 9 **Agree = 0**
Disagree = 5
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	San Francisco, Bar Association of	M			This concept is implicit in RPC 3 110 and the ABA rule will be very helpful.	No action needed.
8	Ventura County District Attorney's Office	M			Paragraph (c)(1) should be adopted and the rest of the Rule should be stricken. Partners & managers should not be subject to discipline for the unanticipated misconduct of others.	Commission did not make the requested revisions. The Rule functions as an integrated whole. Deleting the other provisions of the Rule would excuse managing lawyers from any responsibility to attempt to assure that the lawyers in the law firm are in compliance with the Rules. Commission revised the comments to the Rule to clarify the obligations of, and interrelationship among, management lawyers. See Comments [5] and [6].
9	Windom, Gary	D	Public Defender, Riverside County; California Public Defenders' Association; & California Council of Chief Defenders		It is the responsibility of the Chief Defender when an individual deputy violates the Rules because it raises issues of training and accountability; there may be some joint liability when a subordinate is repeatedly violating the rules. The definition of supervisor is extremely vague; lead attorneys with experience act as mentors to new hires, but they are not "supervisors" even though they have some supervisory responsibilities. Agrees with testimony of Michael Judge.	Commission revised the comments to the Rule 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". See Comment [6]. Commission specifically added new Comment [5] to clarify the respective roles of intermediate managers and higher level attorney managers. See also Comment [6]. See also Response to Public Comment of Michael Judge.