

2022 Bay Area MCLE Conference
Substance Abuse in the Legal Profession
November 17, 2022

Rules of Professional Conduct:

- <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules> - See Rules **1.1, 5.1, 5.2**

Reading the signs of a problem:

- <https://www.calbar.ca.gov/Attorneys/For-Attorneys/Lawyer-Assistance-Program/LAP-Resources>
- https://www.americanbar.org/groups/lawyer_assistance/resources/covid-19--mental-health-resources/

Cognitive decline/dementia:

- <https://www.dementia.org.au/about-dementia/health-professionals/dementia-the-essentials/early-warning-signs>

Mood disorders:

- https://www.calbar.ca.gov/Portals/0/documents/lap/LAP_Depression-Test.pdf?ver=2017-05-19-133759-837

Some interesting biographies for those who like to read and are interested to understand more about mental illness:

- *The Center Cannot Hold* by Elyn Saks, a lawyer and law professor with schizophrenia.
- *Darkness Visible* by William Styron (author of *Sophie's Choice*) describing his descent into a major depressive disorder that almost led to suicide.
- *This Close to Happy* by Daphne Merkin – a literary critic, essayist and novelist who wrote about her experience with depression.
- *An Unquiet Mind* by Dr. Kay Redfield Jamison, a professor of psychiatry at Johns Hopkins University who has written about her own experience with Bipolar Disorder

Rule 1.1 Competence
(Rule Approved by the Supreme Court, Effective March 22, 2021)

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, 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 (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

[2] This rule addresses only a lawyer’s responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[3] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.



The State Bar of California

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer who individually or together with other lawyers possesses 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, whether or not a member or employee of the same law firm,* 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 relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies 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. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the rules or State Bar Act. However, 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.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these rules and the State Bar Act. This rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. (See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).)

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another's Lawyer's Violation

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules.

NEW RULE OF PROFESSIONAL CONDUCT 5.1
(See Former Rule 3-110 Discussion)
Responsibilities of Managerial and Supervisory Lawyers

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

Rule As Issued For 90-day Public Comment

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 that 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 that a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer.

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

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

The following is a summary of proposed rule 5.1 (Responsibilities of Managerial and Supervisory Lawyers).²

Proposed rule 5.1 incorporates the substance of ABA Model Rule 5.1. Paragraph (a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that all lawyers in the firm comply with the Rules of Professional Conduct and the State Bar Act. Paragraph (b) requires that a lawyer who directly supervises another lawyer make “reasonable efforts to ensure” the other lawyer complies with the Rules of Professional Conduct and the State Bar Act, whether or not the other lawyer is a member or employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for a subordinate’s violation of a rule under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the subordinate, ((c)(1)), or knowing of the misconduct, failed to take remedial action when there was still time to avoid or mitigate the consequences, ((c)(2)).

As initially circulated for 90-day public comment, there were nine comments to the rule. Comments [1] – [4] describe the duties of managerial lawyers to reasonably assure compliance with the rules under paragraph (a). Comment [5] states that whether a lawyer has direct supervisory authority over another lawyer in a specific instance is a question of fact. Comments [6] – [9] clarify when a supervisory lawyer is responsible for another lawyer’s violation.

National Background – Adoption of Model Rule 5.1

As California does not presently have a direct counterpart to Model Rule 5.1, 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 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.pdf

Thirty-one states have adopted Model Rule 5.1 verbatim. Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1. Five states have adopted a version of the rule that is substantially different to Model Rule 5.1. One state has not adopted a version Model Rule 5.1.³

Revisions Following 90-Day Public Comment Period

After consideration of comments received in response to the initial 90-day public comment period, the Commission added Comment [6], the concept of which is derived from proposed rule 5.2(b). In addition, the Commission modified Comment [3] for clarity and deleted Comment [9] as unnecessary.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

² The executive summaries for proposed rules 5.2 and 5.3 are provided separately.

³ The one state is California.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 5.1 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. Comment [6] was deleted in its entirety and subsequent Comments were renumbered accordingly.

**Rule 5.1 Responsibilities of a Partner or Managerial and Supervisory
Lawyer^{*} Lawyers^{*}**
(Redline Comparison to the ABA Model 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 conform to the Rules of Professional Conduct^{*} comply with these rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,^{*} 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 Rules of Professional Conduct^{*} these rules and the State Bar Act if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable, individually or together with other lawyers, possesses managerial authority in the law firm^{*} in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,^{*} and knows^{*} of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable^{*} remedial action.

Comment

~~[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.~~ Duties Of Managerial Lawyers To Reasonably^{*} Assure Compliance with the Rules

[21] 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 firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

~~[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.~~

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies 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. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the rules or State Bar Act. However, 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.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these rules and the State Bar Act. This rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. (See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).)

Paragraph (b) – Duties of Supervisory Lawyers

~~[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as Whether 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~~

Paragraph (c) – Responsibility for Another’s Lawyer’s Violation

[6] ~~The appropriateness of remedial action under paragraph (c)(2) would depend on the immediacy of that lawyer’s involvement and thenature and seriousness of the misconduct. A supervisor is required to and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the supervisor knowslawyer 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.~~

[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.~~

[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. A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.~~

[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). the Rules of Professional Conduct. See Rule 5.2(a). Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these rules.~~



The State Bar of California

Rule 5.2 Responsibilities of a Subordinate Lawyer (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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.

NEW RULE OF PROFESSIONAL CONDUCT 5.2
(No Former 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 Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 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. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."¹ The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Rule As Issued For 90-day Public Comment

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.

The following is a summary of proposed rule 5.2 (Responsibilities of a Subordinate Lawyer).² This proposed rule has been adopted by the Commission for submission to the Board of

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

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

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

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 lawyer's responsibilities under the Rules of Professional Conduct or the State Bar Act.

National Background – Adoption of Model Rule 5.2

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

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

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

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 5.2 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. An omitted asterisk for a defined term was added.

**Rule 5.2 Responsibilities of a Subordinate Lawyer
(Redline Comparison to the 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 Rules of Professional Conduct these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

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

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



The State Bar of California

LAP Resources

The Lawyer Assistance Program (LAP) helps current, former, and disbarred attorneys, law students, and State Bar applicants dealing with mental health and/or substance use issues affecting their personal and professional lives.

Here are self-help resources you can use to assess and support your well-being.

Self-assessment tests

Have you ever been depressed, anxious, or concerned about your use of alcohol or drugs? If so, we encourage you to complete one or more of the self-assessment tests below.

These tests cannot serve as a substitute for a professional evaluation, however the results can help you decide if you should contact the LAP for a more thorough professional assessment.

- The Twenty Questions
- Anxiety Assessment
- Depression Assessment

Publications

- The State Bar's Wellness Guide for Senior Lawyers and their Families, Friends, and Colleagues.
- LAP pamphlet
- LAP flyer

Web resources

- California Lawyers Association: Health and Wellness
- The Other Bar This confidential peer support resource for California lawyers, judges, law students, State Bar applicants and their families offers help with problematic alcohol and drug use and related personal problems.
- ABA: Mental Health Resources for the Legal Profession

Contact us

Want to know more? Your call or email is confidential.

877-LAP-4HELP/877-527-4435

LAP@calbar.ca.gov

Mental Health Resources

Mental Health Resources for the Legal Profession

Provided by ABA Commission on Lawyers Assistance Programs

Share:



Lawyer Assistance Programs (LAPs) throughout the country provide confidential services and support to judges, lawyers and law students who facing are mental health or substance use issues.

To find the lawyers assistance program in your jurisdiction view directory.

Anxiety

- Coping with Anxiety
- Don't Catastrophize: A Simple 4-Step Exercise to Stay Calm in the Face of Coronavirus Uncertainty
- Short Videos on Coping with Anxiety
- To get free confidential, 24/7 support for anxiety, text "HOME" to the Crisis Text Line which is 741741. Learn more
- Science-based strategies for coping with COVID anxiety
- Guided meditation (23 minutes) for dealing with anxiety

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Law Practice Management/Leadership

- COVID-19: Protecting Your Workforce's Wellbeing - Panel discussion to provide employers with insights around what they should be considering when it comes to pandemic preparedness (video)
- Covid-19: Awareness, Response, and Workplace Plans/Policies (Part 1)
- Covid-19: Law Firm Operations (Part 2)
- Covid-19: Serving Clients (Part 3)
- Law Practice Management Systems
- Mindful Listening: An Interview with Paul Steven Singerman
- Prioritizing in a Pandemic for Law Firms (video)
- Remote Working: Setting Yourself and Your Teams Up for Success
- Supporting Your Lawyers' Mental Health
- What Law Firms Can Do to Promote Mental Health for Their Lawyers
- This article discusses organizational leadership and managing COVID-19 panic. Read article
- Here are tips for working remotely from Fast Company: View tips.

Panic

- This article shares specifics about mental health and panic associated with COVID-19. Read

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- Action for Happiness Coping Calendar
- Challenges for mental health and coping mechanisms during COVID-19 are outlined by the CDC
- Coping with Fear and Panic
- Daily, Free Guided Meditations
- Dealing with the grief over losses, cancellations, etc.
- Easy Ways to Integrate Self-Care into Your Daily Life
- Emotions Anonymous: "An international fellowship of people who desire to have a better sense of emotional well-being" (online weekly meetings available)
- For Parents – Give Yourself Permission to Recharge
- Free Meditations: Oprah & Deepak 21-Day Meditation Experience on Finding Hope in Uncertain Times (20-25 min daily sessions) Center for Mindful Self-Compassion (45 min daily sessions)
- During these uncertain times, legal employers can benefit from intentionally building opportunities for employees to connect as part of their COVID-19 response plan. Learn more from Gallagher Global Innovation Leader, Organizational Wellbeing, Kathleen Schulz in this article, "COVID-19 and Emotional Wellbeing."
- How Sleep Affects Your Mental Health
- How the Wisdom of 12-Step Programs Can Help Get Us Through April

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- Positive Psychology Strategies for Dealing with a Crisis (*The Crisis Kit*)
- Great tips for staying mentally healthy
- Find tips for managing our mental health in troubling times
- Suggestions for taking care of your mental health in the face of uncertainty from the American Foundation for Suicide Prevention
- National Association for the Mentally Ill Online Support Groups
- Depression and Bipolar Support Alliance

Stress

- This article provides tips on managing stress levels in the office. Read article
- Coping with Stress (4 page flyer from SAMHSA)

Substance Use Resources

- AA
- AA – Online
- AA COVID-19 Informational Page
- Al-Anon
- Al-Anon – Online

◦ IDAA

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- NA Online Meetings "Addicts helping Addicts Recover"
- NA COVID-19 Informational Page
- Online Support Group meetings
- Podcast: Substance Abuse and Mental Illness in the Legal Profession
- Recovery Dharma: "Healing from Addiction with Buddhist Practice", daily meetings via computer, smartphone or dial-in
- Smart Recovery
- Staying Sober During Covid-19
- Author Brian Cuban's blog "The Addicted Lawyer" offers guidance and options for recovery meetings.
- Importance of seeking help for mental health and substance use disorders - Fear Not: Speaking Out to End Stigma (three minute video)

Suicide

Free, confidential 24/7 support for people in distress, prevention and crisis resources for oneself and others Suicide Prevention Lifeline: 1-800-273-TALK

Law Student Resources

- Coronavirus resources and information for law students

Other

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**Dementia
Australia®**

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Free information kit Helpline webchat Email support

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Early warning signs



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Early warning signs

[The diagnostic types of dementia](#)

[The disease trajectory](#)

[Dementia statistics and epidemiology](#)

Early warning signs

The early signs of dementia are very subtle and may not be immediately obvious. Early symptoms also vary across individual patients.

The early signs of dementia include:

1. Memory loss that disrupts daily life
2. Repetitive behaviour
3. Difficulty performing familiar tasks
4. Social isolation
5. Confusion about time and place
6. Problems with abstract thinking
7. Loss of initiative
8. Poor or decreased judgement
9. Language problems
10. Other behavioural changes

For more information:

[Warning signs for dementia vs. typical age related change.](#)

[Diagnostic criteria.](#)

**The State Bar of California
Lawyer Assistance Program (LAP)
877-LAP 4 HELP (877-527-4435)**

DEPRESSION Self-Assessment Test

One out of five Americans will experience a major depressive episode at least once during his/her lifetime. The rate for lawyers is 3-4 times that rate.

If you are experiencing any of the following, please consult the LAP for confidential help.

Has there been at least a 2-week period of time in which you experienced either depressed mood, or loss of interest or pleasure?

Are you:

- ☐ feeling sad, empty and/or irritable?
- ☐ feeling a loss of interest or pleasure in activities or work you once enjoyed?
- ☐ experiencing changes in weight and/or appetite?
- ☐ having increased difficulty sleeping, or sleeping more than usual?
- ☐ experiencing increased restlessness?
- ☐ experiencing a decrease in level of activity noticeable to others?
- ☐ feeling more fatigued or less energetic?
- ☐ having difficulty concentrating, remembering or making decisions?
- ☐ feeling overwhelming guilt, hopelessness or worthlessness?
- ☐ thinking of suicide or death?

If you answered YES to the last item, you should seek help IMMEDIATELY (regardless of your answer to any other questions).

If you answered YES to even a few of these questions, you may suffer from depression.
You should get a professional assessment.
The LAP will help.

CALL THE LAP * ALL CALLS ARE CONFIDENTIAL * (877) LAP-4-HELP * DON'T WAIT

Disclaimer – *This self-assessment is not intended to take the place of a professional evaluation. If you have any questions or concerns, you should talk to a mental health professional.*