

LAW FIRMS AND ASSOCIATIONS

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

1. Current Kentucky Rule with Official Comments:

SCR 3.130(5.1) Responsibilities of a partner or supervisory lawyer

(a) A partner 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.

(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.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner 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.

Supreme Court Commentary

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a

large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures 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 a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

[3] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The 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.

[5] 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.

[6] 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.

2. Proposed Kentucky Rule with Official Comments:

LAW FIRMS AND ASSOCIATIONS

SCR 3.130(5.1) Responsibilities of ~~a partner~~ partners, managers or and supervisory lawyer lawyers

(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.

(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.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) ~~The~~ the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) ~~The~~ 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.

~~Supreme Court Commentary~~ Comment

[1] ~~Paragraphs~~ Paragraph (a) and ~~(b)~~ refer applies to lawyers who have ~~supervisory~~ managerial authority over the professional work of a firm or ~~legal department of a government agency~~. See Rule 1.0(c). This includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having ~~supervisory~~ comparable managerial authority in ~~the~~ 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.

[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.

~~[2]~~ [3] The Other measures that may be required to fulfill the responsibility prescribed in ~~paragraphs~~ paragraph (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and ~~occasional admonition~~ periodic review of compliance with the required systems ordinarily ~~might be sufficient~~ will suffice. In a large firm, or in practice situations in which ~~intensely~~ difficult ethical problems frequently arise, more elaborate ~~procedures~~ 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 ~~a lawyer having authority over the work of another~~ the partners may not assume that ~~the subordinate lawyer~~ all lawyers associated with the firm will inevitably conform to the Rules.

~~[3]~~ [4] Paragraph (c)(1) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[4] [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 ~~of a private firm~~ 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 direct authority over 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 ~~the partner's~~ that lawyer's

involvement and the seriousness of the misconduct. ~~The~~ 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.

~~[5]~~ [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.

~~[6]~~ [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.

[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).

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The Committee adopted the MR as recommended by the Commission. The ABA Reporter's Explanation of Changes to MR 5.1 expresses the Committee's view for those changes. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

ABA Reporter's Explanation of Changes -- Model Rule 5.1

TEXT:

1. Caption: The caption has been modified to reflect the applicability of paragraph (a) to lawyers who possess managerial authority comparable to that of a partner.
2. Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner

This change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal services organizations, as well as to partners in private law firms. No change in substance is intended.

COMMENT:

[1] A cross reference to the definition of a law firm in Rule 1.0(c) has been added. Also, a new sentence has been added to call attention to the difference between lawyers who possess managerial authority comparable to that possessed by law firm partners and who are subject to paragraph (a) and supervisory lawyers who must comply with paragraph (b).

[2] This new Comment provides examples of policies and procedures that partners and managing lawyers should have in place in order to comply with paragraph (a).

[3] Current Comment [2] has been modified so it refers exclusively to paragraph (a). Other minor changes reflect that the policies and procedures required by paragraph (a) may vary with the structure of a firm and the nature of its practice.

[4] Current Comment [3] has been modified to emphasize that paragraph (c), as distinct from paragraphs (a) and (b), specifies circumstances in which a lawyer will be held personally responsible for the specific misconduct of another lawyer.

[5] Current Comment [4] has been modified to clarify that paragraph (c)(2) applies to partners and lawyers with comparable managerial authority, as well as to supervising lawyers.

[8] This new Comment emphasizes that the extra duties imposed on partners, managing lawyers and supervisory lawyers by Rule 5.1 does not alter the basic duty of each lawyer in a firm to personally comply with the Rules of Professional Conduct. Although emphasis is added, no change in substance is intended.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 5.1 from MR 5.1.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.