

THE UPDATE

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SAN DIEGO
DEFENSE LAWYERS



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MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are \$125.00 for new members for the first year and \$160.00 per year for renewing members. The dues year runs from January 1 to December 31. Applications can be downloaded at: sddl.org.

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State Bar Approves Provisional License Program Placing Monitoring Burden on Supervising Lawyers

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The State Bar of California recently announced it would allow provisional licensure of 2020 law school graduates. New Rule of Court 9.49, which is effective November 17, 2020, allows approved 2020 law school graduates who have not passed the bar exam to practice as “Provisionally Licensed Lawyers” under the supervision of a licensed California attorney.

According to the State Bar’s news release, “Provisionally licensed lawyers will be able to engage in all the activities of a fully licensed lawyer, subject to certain restrictions. Both the provisionally licensed lawyer and their supervising lawyer are expected to abide by all applicable State Bar rules and guidelines and are bound by the disciplinary authority of the California Supreme Court and the State Bar.”

Instead of listing all requirements in New Rule of Court 9.49 (which all members should read), this article outlines the requirements with which California lawyers must comply with when supervising less experienced lawyers and unlicensed persons in our offices.

The Provisionally Licensed Lawyer is considered a “subordinate” of the supervising lawyer to whom the provisional lawyer must report. Rule of Professional Conduct 5.1 outlines the general responsibilities of Managerial and Supervisory Lawyers. Rule 5.1 requires supervising lawyers “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” and “[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.” (Rules Prof. Cond., Rule 5.1, subds. (a)-(b).)

A lawyer “shall be responsible for another lawyer’s violation” of the Rules of Professional Conduct if the lawyer orders or ratifies the conduct, or possesses managerial authority in the law firm or is a direct supervisor *and knows* of the conduct “at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” (Rules Prof. Cond., Rule 5.1, subd. (c).)

New Rule of Court 9.49 goes a bit further requiring the supervising lawyer “[a]gree to assume professional responsibility for any work that the Provisionally Licensed Lawyer performs” and agree “to assume personal representation of the Provisionally Licensed Lawyer’s clients if the Provisionally Licensed Lawyer becomes ineligible to practice” or is otherwise unavailable.

Rule of Professional Conduct 5.2 provides the responsibilities of the Subordinate Lawyer, which will now include the Provisionally Licensed Lawyers under New Rule of Court 9.49. Rule 5.2 makes clear that subordinate lawyers have an independent duty to comply with the Rules of Professional Conduct and the State Bar Act regardless if the subordinate lawyer “[a]cts at the direction of another lawyer or other person.” (Rules Prof. Cond., Rule 5.2, subd. (a).)

For purposes of State Bar enforcement, subordinate lawyers (including Provisionally Licensed Lawyers) are shielded from liability for their own acts

only “if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” (Rules Prof. Cond., Rule 5.2, subd. (b); see e.g. *Langer v. Badger Co., LLC* (S.D. Cal., May 15, 2020, No. 18CV934-LAB (AGS)) 2020 WL 2522081, at *3 [“Whether to obey or disobey the Court’s order was not an arguable question.”].)

Rule of Professional Conduct 5.3 requires the conduct of nonlawyer staff comply with the duty of competence and all other obligations of a lawyer. The lawyer has an affirmative obligation to inform staff members without legal training of those obligations.

While the State Bar has obviously never issued disciplinary decisions addressing conduct of a Provisionally Licensed Attorney, it has repeatedly disciplined attorneys for failing to monitor subordinates in their office. (*See Matter of Kaplan* (Cal. Bar Ct., Aug. 20, 1993) 2 Cal. State Bar Ct. Rptr. 509 [Recommending three-month actual suspension for failing to monitor office manager and legal secretary]; *In re Huang* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296 [Recommending two-year suspension for failing to properly supervise non-lawyers who gave legal advice and failed to perform competent services in high-volume practice]; *Hu v. Fang* (2002) 104 Cal.App.4th 61 [paralegal’s mistake is attributable to lawyer responsible for supervising the paralegal because even though a lawyer cannot be held responsible for every detail of office procedure, the lawyer must accept responsibility to supervise the work of the lawyer’s staff].)

Accordingly, as with all persons working in our offices, it is imperative supervising lawyers take all reasonable steps to monitor and supervise all Provisionally Licensed Lawyers under their direction. 🍷