Proposed Rule 5.3 [RPC 1-300]
"Responsibilities Regarding Nonlawyer Assistants"

(**Draft #10, 10/18/09**)

Summary: Proposed Rule 5.3 is closely based on Model Rule 5.3 and sets forth the responsibilities of managerial and supervising lawyers in their oversight of nonlawyer assistants. The Rule is consistent with current California law. See California rule 3-110, Discussion.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☑ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	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 __1__
Abstain __2__

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:

☐ Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.3* Responsibilities Regarding Nonlawyer Assistants

October 2009
(Draft rule following consideration for public comment)

INTRODUCTION:

Proposed Rule 5.3, which substantially tracks Model Rule 5.3, imposes a duty on partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers, to oversee the conduct of nonlawyers 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 nonlawyers under the lawyer's supervision, orders or ratifies the misconduct of a nonlawyer, or has knowledge of the nonlawyer's misconduct and fails to take steps to prevent or mitigate the consequences. The Comment to the proposed Rule largely tracks the Model Rule comment.

Current California Law and Variations in Other Jurisdictions. Model Rule 5.3 is the rule in nearly every jurisdiction, with only minor variations. For example, both Illinois and New Hampshire impose Rule 5.3'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 5.3. All jurisdictions have adopted some version of Model Rule 5.3(c). California does not have a counterpart to Rule 5.3. 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 5.3 establishes in a separate rule the principle of supervisory responsibility and is consistent with existing California case law.

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* Proposed Rule 5.3, Draft 10 (10/18/09)

ABA Model Rule **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**	**Commission's Proposed Rule*** **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**	**Explanation of Changes to the ABA Model Rule**
With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer;	With respect to a nonlawyer employed or retained by or associated with a lawyer: (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 the ~~person's~~nonlawyer's conduct is compatible with the professional obligations of the lawyer;	The Introductory paragraph to proposed Rule 5.3 is identical to Model Rule 5.3. Paragraph (a) largely tracks Model Rule 5.3(a), except for two clarifying changes: (1) the phrase "in a law firm" has been added after the words, "a partner," to create a parallel construction with the clause that follows and also to conform to the syntax used in the related Rule 5.1; and (2) "nonlawyer" has been substituted for "person" to refer back to the word "nonlawyer" that is used in the introductory clause.
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and	(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and	Paragraph (b) is identical to Model Rule 5.3(b).
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or	(c) a lawyer shall be responsible for conduct of such a person that would be a violation of ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if engaged in by a lawyer if: (1) the lawyer orders or, with ~~the~~ knowledge of the specific conduct, ratifies the conduct involved; or	Paragraph (c) largely tracks Model Rule 5.3(c), except that the clause, "individually or together with other lawyers" has been added to subparagraph (c)(2) to parallel the language used in paragraph (a). The deletion of this language is an apparent oversight by the Model Rule drafters. The phrase, "these Rules or the State Bar Act" is a term the Commission has been using throughout the Rules in place of the Model Rules' "the Rules of Professional Conduct."

* Proposed Rule 5.3, Draft 10 (10/18/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	Commission's Proposed Rule* Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	Explanation of Changes to the ABA Model Rule
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	(2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.	

ABA Model Rule **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants** **Comment**	**Commission's Proposed Rule** **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants** **Comment**	**Explanation of Changes to the ABA Model Rule**
[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.	[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *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 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161].) The measures employed in instructing and supervising nonlawyers should take account of the fact that they ~~do~~may not have legal training~~ and are not subject to professional discipline~~.	Comment [1] largely tracks Model Rule 5.3, cmt. [1]. The word "confidential" has been added to the phrase, "information relating to the representation of the client," because that term ("confidential information relating to the representation of the client") is a defined term in these Rules. See proposed Rule 1.6, cmts. [3] et seq. Citations to several cases have been added for guidance. These citations are largely carried over from the Discussion to current rule 3-110 ("Competence"). The word "instructing" has been added to the last sentence of Comment [1] because instruction of nonlawyers of their responsibilities as employees of the law firm is an important component of providing assurance nonlawyers' conduct is compatible with the lawyer's professional obligations. The word "may" has been substituted for "do" because some nonlawyers will have had legal training. Finally, the last clause of the last sentence of Comment [1] has been deleted because whether a nonlawyer employee is personally subject to discipline is irrelevant to the care a lawyer should take in that person's instruction and supervision.

ABA Model Rule **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants** **Comment**	**Commission's Proposed Rule** **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants** **Comment**	**Explanation of Changes to the ABA Model Rule**
[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 nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.	[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 nonlawyers in the firm will act in a way compatible with ~~the~~these Rules ~~of Professional Conduct~~and the State Bar Act. See Comment [~~1~~2] to Rule 5.1. ~~Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer.~~ Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in ~~by a lawyer~~private law firms. [3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of ~~the~~ these Rules ~~of Professional Conduct~~ or the State Bar Act if engaged in by a lawyer.	The next to last sentence of Model Rule 5.3, cmt. [2] has been deleted because it simply restates paragraph (b). In its place, a sentence has been added to clarify that the obligations set forth in Rule 5.3 apply equally to lawyers with managerial authority in corporate and government legal departments and legal service organizations. The phrase, "these Rules or the State Bar Act" is a term the Commission has been using throughout the Rules in place of the Model Rules' "the Rules of Professional Conduct." Comment [3] is identical to the last sentence of Model Rule 5.3, cmt. [2]. The sentence, which addresses a different part of the rule than the remainder of Comment [2], has been moved to its own comment for clarification.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(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 the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if engaged in by a lawyer if:

(1) the lawyer orders or, with ~~the~~ 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 person is employed, or has direct supervisory authority over the person, 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] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; 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 [177 Cal.Rptr. 670]; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161].) The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

[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 nonlawyers in the firm will act in a way compatible with ~~the~~these Rules ~~of Professional Conduct~~and the State Bar Act. See Comment [~~1~~2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if engaged in by a lawyer.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

(Commission's Proposed Rule – Clean Version)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(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 the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer 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 person is employed, or has direct supervisory authority over the person, 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] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *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 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161].) The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

[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 nonlawyers in the firm will act in a way compatible with these Rules and the State Bar Act. See Comment [2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

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 provision comparable to ABA Model Rule 5.3.

Georgia adds a new Rule 5.3(d) that indirectly restricts the activities of suspended or disbarred lawyers who work in a law office.

Illinois: Rule 5.3(a) applies to "[t]he lawyer, and, in a law firm, each partner," and refers to the professional obligations of the lawyer "and the firm." Illinois Rule 5.3(b) applies to "each" lawyer having direct supervisory authority.

New Hampshire: Rules 5.3(a) and (b) impose duties on "each" partner in a firm, "each" lawyer with comparable managerial authority, and "each" lawyer with direct supervisory authority. Separately, New Hampshire Supreme Court Rule 35 (Guidelines for the Utilization by Lawyers of the Services of Legal Assistants under the New Hampshire Rules of Professional Conduct) contains nine rules for using the services of legal assistants in compliance with Rule 5.3. For example, Rule 1 provides:

> It is the responsibility of the lawyer to take all steps reasonably necessary to ensure that a legal assistant for whose work the lawyer is responsible does not provide legal advice or otherwise engage in the unauthorized practice of law; provided, however, that with adequate lawyer supervision the legal assistant may provide information concerning legal matters and otherwise act as permitted under these rules.

New Jersey: Rule 5.3(a) provides that "every lawyer or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer." In addition, New Jersey has added Rule 5.3(c)(3), which provides that a lawyer is responsible for the conduct of a nonlawyer employee if "the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct."

New York: See New York's DR 1-104(C) under Selected State Variations for Rule 5.1. DR 1-104(D) makes a lawyer responsible for conduct of a nonlawyer subordinate or lawyer if, among other things, the lawyer "in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action... could have been taken at a time when its consequences... could have been avoided or mitigated."

Oregon: Rule 5.3(b) begins: "except as provided by Rule 8.4(b)...." Under Oregon Rule 8.4(b), it is generally not professional misconduct for a lawyer to give advice about or to supervise "lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights" provided the lawyer otherwise abides by the Rules of Professional Conduct.

Rhode Island: Immediately after the Comment to Rule 5.3, Rhode Island includes a lengthy set of "Guidelines" for the use of legal assistants. These "Guidelines" are a heavily modified version of the ABA Model Guidelines for the Utilization of Paralegal Services (see Related, Materials below). For example, Rhode Island's Guideline 3, which is closely related to Rule 5.3, provides as follows:

> 3. A lawyer shall direct a legal assistant to avoid any conduct which if engaged in by a lawyer would violate the Rules of Professional Conduct. In particular, the lawyer shall instruct the legal assistant regarding the confidential nature of the attorney/client relationship, and shall direct the legal assistant to refrain from disclosing any confidential information obtained from a client or in connection with representation of a client.

Texas relegates ABA Model Rule 5.3(a) to Comment 2 after Texas Rule 5.03. The Comment applies to "[e]ach lawyer in a position of authority in a law firm or in a government agency," including lawyers having supervisory authority or "intermediate managerial responsibilities in the law department of any enterprise or government agency." Texas Rule 5.03(b), which is equivalent to ABA Model Rule 5.3(c), subjects a lawyer to discipline for a nonlawyer's misconduct if (1) the lawyer orders, "encourages, or permits" the conduct involved; or (2) the lawyer:

> (i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and
>
> (ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

Virginia: Rule 5.3(c)(2) applies if a lawyer knows "or should have known" of the conduct in question.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants.
[Sorted by Commenter]

TOTAL = 4 **Agree = 3**
Disagree =
Modify = 1
NI =

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			Support as drafted.	No action needed.
2	Orange County Bar Association	A			Support as drafted.	No action needed.
3	San Diego County Bar Association	A			Support as drafted.	No action needed.
4	San Francisco, Bar Association of	M			While concept is implicit in California's current rules, adoption of the ABA's explicit rule is helpful. Comment [1] should be revised to delete the reference to "confidential information" and insert the phrase to "all information relating to the representation, whatever its source."	No action needed. Commission disagreed and did not make the requested change. The complete term, "confidential information relating to the representation of the client," is a defined term in the Rules. Changing the term would cause confusion.

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