

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
(Commission's Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)**

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

- (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 the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* 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 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 person* is employed, or has direct supervisory authority over the person,* whether or not an 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

Lawyers often utilize nonlawyer personnel, 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 all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.3
(Current Rule 3-110 Disc.)
Responsibilities Regarding Nonlawyer Assistants

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 Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), ABA Model Rule 5.2 (Responsibilities of a Subordinate Lawyer), and ABA Model Rule 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).

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.

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 5.3 (Responsibilities Regarding Nonlawyer Assistants).² This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.3 adopts the substance of ABA Model Rule 5.3. Proposed rule 5.3 is very similar to proposed rule 5.1. The major difference is that proposed rule 5.3 applies to the supervision of nonlawyer assistants and other legal support services, whereas proposed rule 5.1 applies to the supervision of lawyers. Proposed rule 5.3(a) requires that managing lawyers make “reasonable efforts to ensure” the law firm has measures that provide reasonable assurance that a nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Paragraph (b) requires that a lawyer who directly supervises a nonlawyer make “reasonable efforts to ensure” the nonlawyer’s conduct is compatible with the professional obligations of the lawyer, whether or not the nonlawyer is an employee of the same firm. Neither provision imposes vicarious liability. However, a lawyer will be responsible for the conduct of a nonlawyer under paragraph (c) if a lawyer either ordered or, with knowledge of the relevant facts and specific conduct, ratifies the conduct of the nonlawyer, ((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)).

There is one comment to the rule. The comment states the policy underlying the rule and explains the lawyer’s obligation in complying with the rule.

National Background – Adoption of Model Rule 5.3

As California does not presently have a direct counterpart to Model Rule 5.3, 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 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf

Thirty-four states have adopted Model Rule 5.3 verbatim.³ Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.⁴ Seven states have adopted a version of the rule that is substantially different to Model Rule 5.3.⁵ One state has not adopted a version Model Rule 5.1.⁶

² The Executive Summaries for proposed Rules 5.1 and 5.2 are provided separately.

³ The thirty-four states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20-20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

⁴ The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

⁵ The six states are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

⁶ The one state is California.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants (Redline Comparison of the Proposed Rule to 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~~nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the ~~person's~~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~~ of the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with ~~the~~ 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 person* is employed, or has direct supervisory authority over the person,* whether or not an 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] Lawyers ~~generally employ assistants in their practice~~often utilize nonlawyer personnel, 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~~lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning ~~the~~all 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 instructing and supervising nonlawyers should take account of the fact that they ~~demight~~ demight not have legal training ~~and are not subject to professional 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 nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. 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.~~

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

Commission Drafting Team Information

Lead Drafter: Robert Kehr

Co-Drafters: Judge Karen Clopton, Howard Kornberg, Toby Rothschild

Meeting Dates at which the Rule was discussed: September 25-26, 2015

Action Summary Approval Date: November 13, 2016

I. CURRENT ABA MODEL RULE 5.3

**[There is no California Rule that corresponds to Model Rule 5.3,
from which proposed Rule 5.3 is derived.]**

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

- (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;
- (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 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
 - (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.

Comment

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

Nonlawyers Within the Firm

[2] 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.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

II. COMMISSION RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

At the Commission's September 25 – 26, 2015 meeting, all members present voted yes.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

III. PROPOSED RULE 5.3 (CLEAN)

Rule 3-110 [5.3] Responsibilities Regarding Nonlawyer Assistants

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

- (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 the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* 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 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 person* is employed, or has direct supervisory authority over the person,* whether or not an 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

Lawyers often utilize nonlawyer personnel, 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 all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

IV. PROPOSED RULE 5.3 (REDLINE TO MODEL RULE 5.3)

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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~~nonlawyer's conduct is compatible with the professional obligations of the

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

lawyer;

- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the ~~person's~~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 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 person* is employed, or has direct supervisory authority over the person,* whether or not an 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] Lawyers generally employ assistants in their practice~~often utilize nonlawyer personnel, 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~~lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning ~~the~~all 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 instructing and supervising nonlawyers should take account of the fact that they ~~do~~might not have legal training ~~and are not subject to professional 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 nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. 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.~~

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

V. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 9/2/2015:**

C. Rule 3-110: Failing to Act Competently [Model Rules 1.1, 1.3, 5.1, 5.2, and 5.3]

The current language of rule 3-110 should be retained. The rule is well understood and there is extensive case law interpreting it. Additionally, the rule and case law address the duty to supervise attorney staff and employees.

With regard to the use of computer technology, a lawyer's duty of competence includes a duty to understand the technology he or she uses in the practice of law. Rule 3-110 is intended to be a general rule. Whether an attorney's failure to know and understand modern technology violates the competence rule should be evaluated in the context of the facts of each particular case. The same rationale applies to a lawyer who outsources services.

- **State Bar Court:** No comments received from State Bar Court.

VI. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants," revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf
- Thirty-four states have adopted Model Rule 5.3 verbatim.¹ Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.² Seven states have adopted a version of the rule that is substantially different to Model Rule 5.3.³ One state has not adopted a version Model Rule 5.1.⁴

¹ The thirty-four states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20-20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

² The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

³ The six states are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

⁴ The one state is California.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

VII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

This Rule is part of an interrelated set of Rules 5.1 – 5.3 that incorporate into separate rules lawyers' duties to supervise subordinate lawyers and nonlawyer assistants, (Rules 5.1 and 5.3, respectively) as well as expressly setting forth duties of subordinate lawyers (Rule 5.2).

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of standalone rules patterned on Model Rules 5.1, 5.2 and 5.3 rather than maintain a duty of supervision in the competence rule (proposed new Rule 1.1, and currently rule 3-110).
 - o Pros: There are a number of reasons for adopting this change in approach:
 1. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in a larger law firm is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?
 2. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty imposed on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent, not just to competent representation, but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110.
 3. The broader application of Model Rules 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.
 4. Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 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. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions.
 5. Model Rule 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

firm. An example would be local counsel who reports to and is directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.

6. Proposed Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.

7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.

- Cons: In its 9/2/2015 submission to the Commission, OCTC stated that the [current] rule and case law address the duty to supervise attorney staff and employees.”
2. Recommend retaining the title of the pre-Ethics 2000 rule, “Responsibilities Regarding Nonlawyer Assistants,” rather than the current Model Rule 5.3 title, which refers to “Assistance.” The
 - Pros: It will conform the rule's title to its content, given that the Commission recommends not including the lengthy discourse in the Comments to Model Rule 5.3 (Comments [3] and [4]) concerning outsourcing and offshoring. (See Section VII.B.2, below.)
 - Cons: None identified.
 3. Recommend editing the Model Rule comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
 - Pros: This conforms to the Commission Charter.
 - Cons: None identified.
 4. Recommend adding to paragraph (b) the language “whether or an employee of the same law firm”.
 - Pros: The concept is important because a lawyer who has direct supervisory responsibility should not be able to avoid application of the rule when acting through a nonlawyer who is outside the first lawyer's firm.
 - Cons: The language should not be added for two reasons: First, the words are unnecessary (in that the Rule would have the same meaning without these words). Second, not including these words would remove the concept from the Rule (and doing so would avoid uncertain application in certain situations).
 5. Recommend adding to paragraph (c)(1) the words “of the relevant facts and”.
 - Pros: Removing these words would eliminate the risk that the supervising lawyer would be thought to have an obligation to investigate, as opposed to supervise, a nonlawyer employee's work.
 - Cons: These words are essential to the rule because a supervising lawyer cannot be held responsible for a nonlawyer employee's work unless the supervising lawyer knows both the nonlawyer employee's conduct and the facts showing that conduct to be wrongful.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.3

B. Concepts Rejected (Pros and Cons):

1. Include the language in Model Rule paragraph 5.3(a) that imposes a duty on each firm partner to take action to assure the firm has appropriate systems in place.
 - Pros: Each partner should take whatever action that lawyer can to achieve the goals of this Rule, even if a particular lawyer does not participate in management or has no independent management authority. No firm partner should be permitted to be blind to wrongful conduct.
 - Cons: Mid-level and other partners who lack management authority would be at unnecessary risk from imposing on them a duty that they cannot fulfill in a meaningful way. If they would not have disciplinary risk, including them in the rule would be only aspirational.
2. Recommend that proposed Rule 5.3 address outsourcing or offshoring of legal services.
 - Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA added new Comments [3] and [4] that address a lawyer using “nonlawyers outside the firm to assist the lawyer in rendering legal services to the client.” In part, this guidance alerts lawyers that they have supervisory responsibilities over such nonlawyers. Including a similar advisement might lead to better decision making by lawyers who outsource legal-related services.
 - Cons: The Commission concluded that there was nothing in this topic that would make the proposed rule more complete. These comments would not explain the rule but instead would provide practice guidance on the possible risks of using nonlawyer outside of the law firm.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

Proposed Rules 5.1 and 5.3 do not substantively change a lawyer’s obligation to supervise, but they add responsibilities for those lawyers who control a law firm to create and enforce firm-wide policies, such as to check for possible conflicts of interest, in order to make it more likely that firms will institute policies that will prevent Rule violations by individual firm lawyers.

D. Non-Substantive Changes to the Current Rule:

Not applicable.

E. Alternatives Considered:

None.

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:
RULE 5.3**

VIII. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 5.3 in the form stated above for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the Rule.

IX. DISSENTING POSITION(S)

None.

X. FINAL COMMISSION VOTE/ACTION

Date of Vote: September 25-26, 2015

Action: Approve Rule 5.3 as revised during the meeting

Vote: 15 (yes) – 0 (no) – 0 (abstain)