

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.~~