

**Rule 5.3 Responsibilities Regarding Nonlawyer Assistants  
(Proposed Rule Adopted by the Board on November 17, 2016)**

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 ABA Model Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 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. 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.”<sup>1</sup> 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).

**Rule As Issued For 90-day Public Comment**

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.

The following is a summary of proposed rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).<sup>2</sup> 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.

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<sup>1</sup> 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].)

<sup>2</sup> The Executive Summaries for proposed rules 5.1 and 5.2 are provided separately.

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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf)

Thirty-four jurisdictions have adopted Model Rule 5.3 verbatim. Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3. Seven jurisdictions have adopted a version of the rule that is substantially different to Model Rule 5.3. One state has not adopted a version Model Rule 5.1.

### **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

## COMMISSION REPORT AND RECOMMENDATION: RULE 5.3

### Commission Drafting Team Information

**Lead Drafter:** Robert Kehr

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

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### 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 Assistants

- (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.

### *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. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed rule 5.3

Vote: 15 (yes) – 0 (no) – 0 (abstain)

**Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed rule 5.3

Vote: 11 (yes) – 0 (no) – 0 (abstain)

**III. COMMISSION'S PROPOSED RULE (CLEAN)**

**Rule 3-110 [5.3] Responsibilities Regarding Nonlawyer Assistance**

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. COMMISSION'S PROPOSED RULE (REDLINE TO ABA 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 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 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.~~

## **V. RULE HISTORY**

There are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, however, there is predicate authority in the California Rules and case law that is in line with those rules. See Section XIII.A Related California Law, below.

For background on the concepts relating to the duty to supervise refer to Report and Recommendation for proposed Rule 1.1, Section V.

Although the origin and history of Model Rule 5.3 was not the primary factor in the Commission's consideration of proposed Rule 5.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 599 - 607, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## **VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. This rule also belongs as part of the duty of competence. OCTC, however, does not oppose having this rule to clarify the duty of a subordinate attorney. This is already the law in California.

Commission Response: Taking the former as a part of OCTC's general comment that it favors retaining a single competence rule that tracks the current rule in lieu of proposed Rules 1.1, 1.3 and 5.1-5.3, and the latter as a comment directed to Rule 5.2, no response is required as to the latter. See Rule 5.1 response to OCTC regarding the former.

2. OCTC is concerned that the Comment to this Rule is unnecessary and merely repeats the rule.

Commission Response: The Commission has considered this objection but believes the Comment provides helpful explanation of the rule's application and so promotes compliance and facilitates enforcement.

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

## **VII. PUBLIC COMMENT & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, four public comments were received. Two comments agreed with the proposed Rule, one comment disagreed, and one comment

agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

### **A. Related California Law**

Although there are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, there is predicate authority in the California Rules and case law that is in line with those rules.

#### **1. Discussion Paragraph To Rule 3-110 Identifies The Duty To Supervise**

The first Discussion paragraph to current rule 3-110 states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney employees and agents."<sup>1</sup> This Discussion paragraph provides citations to seven lawyer disciplinary cases, which are listed below with a brief statement of the context in which discipline was imposed at least in part for a breach of supervisory responsibilities.

#### **2. Authorities Considered by the Commission**

The following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [224 Cal.Rptr. 101] (Lawyer was disciplined for misappropriating client money for office expenses. Lawyer's negligence in supervising his office was a factor in the misconduct.)
- *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525] (Lawyer settled client's claim without the client's consent. Lawyer claimed that secretarial errors caused a failure to promptly deliver the settlement proceeds to the client. This Court found that even without deliberate wrongdoing, fiduciary violations resulting from lapses in office procedure may be deemed "wilful" for disciplinary purposes and the lawyer failed to show that office staff was properly supervised.)
- *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834] (Lawyer endorsed his client's name on a check payable to the client without client authorization and claimed that an office employee mistakenly deposited the check in the lawyer's payroll account instead of the client trust account. This Court found the evidence demonstrated the lawyer's pervasive carelessness in failing to give the office manager any supervision and that the lawyer generally failed to instruct the office manager on trust account requirements and procedures.)

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<sup>1</sup> This first paragraph of the Discussion section was added operative May 26, 1989. (See Bar Misc. No. 5626, "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December 1987.)

- *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 – 123 [177 Cal.Rptr. 670] (Lawyer claimed that letter communications with a party represented by counsel without that counsel’s consent were sent inadvertently by office staff. This Court found that the attorney was responsible for the work product of his employees, which is performed pursuant to his direction and authority.)
- *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288] (Lawyer blamed secretary mismanagement for a disbursement from his client trust account when there were insufficient funds on deposit. This Court observed that the rule governing client trust accounts is binding upon attorneys – not lay personnel – and necessitates reasonable staff supervision in the handling of trust account matters.)
- *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 – 858 [100 Cal.Rptr. 713] (Lawyer blamed his staff for mistakes in securing an execution against client’s husband to collect attorney fees that the husband had already partially paid in a divorce proceeding. This Court disciplined the lawyer for the mistakes and stated that even though an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of office staff.)
- *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161] (Lawyer relied on staff and a subordinate lawyer who failed to perform legal services for client. Even after a default judgment was entered and the client repeatedly sought assurances from lawyer that relief from default would be sought, lawyer failed to check on whether the subordinate lawyer and staff actually sought relief from default. This Court disciplined the lawyer for continued neglect in overly relying on, and failing to closely supervise, the subordinate lawyer and staff.)

## B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised December 8, 2016, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.authcheckdam.pdf) [Last visited 2/6/17]
- Thirty-four jurisdictions have adopted Model Rule 5.3 verbatim.<sup>2</sup> Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.<sup>3</sup> Seven jurisdictions

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<sup>2</sup> The thirty-four jurisdictions 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.

have adopted a version of the rule that is substantially different to Model Rule 5.3.<sup>4</sup> One jurisdiction has not adopted a version Model Rule 5.3: California.

**IX. 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) and states the 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).
  - 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. There is additional client protection in adding definition to the duties of firm managers and supervisors.
    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.

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<sup>3</sup> The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

<sup>4</sup> The six jurisdictions are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

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 firm. Examples would include local counsel and contract lawyers who report to and are 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 IX.B.2, below.)
    - Cons: None identified.

3. 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).
4. Recommend adding to paragraph (c)(1) the words “of the relevant facts and”.
  - Pros: This addition is intended to limit a supervisor’s responsibility to the situation in which the supervisor knows of the relevant facts and not just the other lawyer’s conduct. Due to the definition of “know” in proposed Rule 1.0.1(f), the supervisor’s knowledge can be inferred from the circumstances. Adding these words makes it clear that a supervising lawyer cannot be responsible for another lawyer’s conduct unless the lawyer has knowledge of the relevant facts, and that knowledge can be inferred from the circumstances. The Commission believes it is important to balance the supervisor’s affirmative obligation to supervise against the risk that overly-inclusive language might cause supervisors to be seen as guarantors of the proper conduct of all lawyers and nonlawyer assistants they supervise. .
  - 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.
5. 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.

## **B. Concepts Rejected (Pros and Cons):**

1. Include the language in Model Rule 5.3 paragraph (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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

**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:**

None.

**E. Alternatives Considered:**

None.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

The Commission recommends adoption of proposed Rule 5.3 in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 5.3 in the form attached to this Report and Recommendation.