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 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] 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.

[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.

ANNOTATION

GENERAL DUTY REGARDING NONLAWYER ASSISTANTS

It is generally accepted that lawyers delegate certain duties to nonlawyer assistants. Model Rule 5.3, cmt. [1]; *see, e.g., Missouri v. Jenkins*, 491 U.S. 274 n.10 (1989) (variety of tasks being performed by legal assistants, law clerks, and other paraprofessionals encourages the cost-effective delivery of legal services). However, although certain tasks are delegable, the lawyer remains responsible for ensuring that those tasks are performed competently, diligently, and otherwise in conformance with the lawyer's own ethical obligations. *See, e.g., Mays v. Neal*, 938 S.W.2d 830 (Ark. 1997) ("while a lawyer may delegate certain tasks to his assistants, he or she, as supervising attorney, has the ultimate responsibility for compliance by the non-lawyer with the applicable provisions of the Model Rules"); N.C. Ethics Op. 2005-2 (2005) (lawyer who hires nonlawyer to represent Social Security claimants must ensure that nonlawyer's conduct is compatible with lawyer's professional obligations, even if nonlawyer is permitted by law to provide unsupervised representation).

A lawyer's duty under Rule 5.3 to supervise nonlawyer assistants differs slightly from the duty under Rule 5.1 to supervise other lawyers. Rule 5.3 requires the responsible lawyer to make reasonable efforts to ensure that the nonlawyer's conduct is "compatible with the professional obligations of the lawyer," while Rule 5.1 requires reasonable efforts to ensure that lawyers in the firm "conform to the Rules of Professional Conduct." The difference in wording recognizes the fact that not every rule applies to legal assistants. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 44.4 (3d ed. 2001 & Supp. 2004) (because nonlawyers may not be disciplined under Model Rules, it may be appropriate for supervising lawyers to exercise correspondingly stricter discipline within law office). *See generally* Arthur G. Greene & Therese A. Cannon, *Paralegals, Profitability, and the Future of Your Law Practice* (2003).

Originally, both Rule 5.1 and Rule 5.3 placed disciplinary responsibility for the misdeeds of subordinates upon the shoulders of partners and supervisory lawyers. In 2002, these Rules were amended to include lawyers with managerial authority "comparable" to that of a partner. The amendments were for clarification and were not intended as a change in substance. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 577 (2006) (change in subsections (a) and (c)(2) of each Rule meant to clarify that Rules "[apply] to managing lawyers in corporate and government legal departments and legal services organizations, as well as to partners in private law firms").

• ***Rule Extends to Supervision of Nonemployees***

Rule 5.3 is concerned not only with the conduct of nonlawyer employees, but also of nonlawyers who are "retained by or associated with a lawyer." *See In re Flack*, 33 P.3d 1281 (Kan. 2001) (lawyer contracted with estate planning company to prepare documents and provide legal services to clients solicited by company; company's service representatives used lawyer's name, committed fraud, and engaged in unauthorized practice of law); D.C. Ethics Op. 321 (2003) (investigator retained to interview unrepresented adverse party); Ill. Ethics Op. 03-07 (2004) (interpreter retained to communicate with hearing-impaired client); Md. Ethics Op. 2004-27 (2004) (marketing firm retained to contact recipients of mailing who did not respond to mailing); Mass. Ethics Op. 2005-04 (2005) (law firm's software provider); Mont. Ethics Op. 001027 (2000) (collection agency engaged to collect lawyer's unpaid fees); Vt. Ethics Op. 2003-03 (2003) (computer consultant); *see also Fla. Bar v. Abrams*, 919 So. 2d 425 (Fla. 2006) (nonlawyer formed corporation to provide legal services and employed lawyer as "Managing Attorney"; lawyer failed to supervise nonlawyer who mishandled client's immigration case); *In re Meltzer*, 741 N.Y.S.2d 240 (App. Div. 2002) (lawyer who formed corporation with nonlawyer and improperly permitted her to provide legal services was responsible in discipline for nonlawyer's neglect, incompetence, and misrepresentation).

Rule 5.3 has also been applied to the supervision of individuals not normally thought of as being "retained by or associated with" the lawyer. In one case, a lawyer was found to have violated Rule 5.3(b) by failing to supervise a *client* adequately. In *In re Cline*, 756 So. 2d 284 (La. 2000), the lawyer entrusted a client with settlement checks erroneously made out to the client's former lawyer, on her representation that she would take the checks to the former lawyer to obtain his endorsement. The court found that the lawyer violated Rule 5.3(b) by failing to take steps to ensure she would actually do so, such as by phoning the former lawyer to alert him that the client would soon be arriving.

In *Fla. Bar v. Flowers*, 672 So. 2d 526 (Fla. 1996), a lawyer was found to have violated Rule 5.3(c) by failing to supervise a nonlawyer "immigration consultant" with whom the lawyer shared office space. Because the office space was arranged to give persons meeting with the consultant the impression they were receiving legal assistance from the lawyer, the lawyer was answerable in discipline for the consultant's mishandling of the client's immigration matter. Notwithstanding the lawyer's argument that he had never met with, received fees from, or provided legal advice to the person seeking immigration advice, the court found that the person was his client-in-fact.

Subsection (a): Duty of Partners/Managers to Ensure Conduct of Nonlawyers Is Compatible with Lawyers' Ethical Obligations

Partners, and lawyers with comparable managerial authority, have an obligation to "make reasonable efforts" to establish measures to ensure that the conduct of nonlawyer assistants is compatible with lawyers' ethical duties. Such measures include instructing nonlawyers about lawyers' ethical duties (especially the duty to maintain client confidences), supervising nonlawyers in a way that does not permit them to

engage in the unauthorized practice of law, and, when appropriate, screening nonlawyers from involvement in particular client matters. *See, e.g., People v. Smith*, 74 P.3d 566 (Colo. O.P.D.J. 2003) (no violation of Rule 5.3(a); lawyer had in place procedures to reasonably assure that legal assistant would act in manner compatible with lawyer ethics rules, but assistant failed to follow them); *Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So. 2d 196 (Fla. Dist. Ct. App. 2000) (nonlawyer employees who formerly worked for firm representing adverse party in litigation should be admonished not to discuss matter with anyone in new firm, and access to information about case should be restricted; court noted that former firm has duty under Rule 5.3 to instruct departing nonlawyer employees about ethical obligation not to disclose confidences of firm's clients); *In re Kellogg*, 4 P.3d 594 (Kan. 2000) (lawyer failed to train employees who mishandled service of summons, failed to docket court date, and failed to enclose refund check in letter of apology from lawyer to client); *In re Farmer*, 950 P.2d 713 (Kan. 1997) (lawyer has affirmative duty to ensure that nonlawyer assistants do not give legal advice to clients or other callers); *State ex rel. Okla. Bar Ass'n v. Patmon*, 939 P.2d 1155 (Okla. 1997) (lawyer regularly allowed secretary to sign lawyer's name on documents and file them with court without oversight, resulting in filing of misleading motion); Me. Ethics Op. 186 (2004) (adequate screening of nonlawyer employee to avoid conflicts of interest may fulfill lawyer's duty to make "reasonable efforts" to ensure nonlawyer's conduct is compatible with professional responsibilities of lawyer); N.Y. State Ethics Op. 762 (2003) (law firm having associates licensed only in foreign countries must ensure that foreign lawyers' compliance with ethics rules of foreign jurisdiction does not compromise firm's compliance with N.Y. Code).

For discussion about screening nonlawyer assistants formerly employed by a law firm representing an adverse party, see the Annotation to Rule 1.10.

Subsection (b): Duties of Supervisory Lawyers

Pursuant to subsection (b), a lawyer with direct supervisory authority over a nonlawyer assistant must make reasonable efforts to ensure that the assistant's conduct is compatible with the lawyer's ethical obligations. *Attorney Grievance Comm'n v. Glenn*, 671 A.2d 463 (Md. 1996) (existence of office procedures to ensure integrity of escrow account did not preclude finding that lawyer failed to supervise employees' management of account adequately); *see also In re Cater*, 887 A.2d 1 (D.C. 2005) (lawyer may violate rule "even if the lawyer does have reason to believe the employee is both honest and capable . . . . Internal controls and supervisory review are essential precisely because employee dishonesty and incompetence are not always identifiable in advance.").

Rule 5.3 requires that the lawyer provide both instruction and oversight. *In re Comish*, 889 So. 2d 236 (La. 2004) (proper supervision "includes adequate instruction when assigning projects, monitoring of the progress of the project, and review of the completed project"); *see, e.g., In re Juhnke*, 41 P.3d 855 (Kan. 2002) (lawyer employed disbarred lawyer—who eventually converted client funds—as legal assistant, letting him meet with clients and write contracts, letters, and pleadings); *In re Wilkinson*, 805 So. 2d 142 (La. 2002) (lawyer told nonlawyer assistant, whose bar admission was pending, not to give legal advice, but had him meet privately with client and then took no

measures to learn what transpired at meeting); *Attorney Grievance Comm'n v. Mooney*, 753 A.2d 17 (Md. 2000) (member of lawyer's office staff incorrectly told client he did not need to attend own trial, resulting in issuance of bench warrant and two-day incarceration of client); *In re Vanderbeek*, 101 P.3d 88 (Wash. 2004) (lawyer failed to provide adequate supervision of bookkeeper-husband, who was overbilling clients); *see also Mahoning County Bar Ass'n v. Lavelle*, 836 N.E.2d 1214 (Ohio 2005) (lawyer violated Code provisions prohibiting conduct prejudicial to administration of justice and conduct adversely reflecting on fitness to practice by failing to supervise secretary who altered dates on documents and sent documents to mortgage company containing fictitious case numbers and court file stamp; "[w]e have long adhered to the standards described in the *Restatement*, which are echoed in Model Rule 5.3").

Thus, a lawyer who turns over the day-to-day operations of a law office—or any discrete part of it, such as its bookkeeping functions—without continuous scrutiny of those operations does so at his or her peril. *See, e.g., People v. Smith*, 74 P.3d 566 (Colo. O.P.D.J. 2003) (lawyer delegated substantial authority to assistant without overseeing her work; assistant failed to notify lawyer of court orders, drafted separation agreement, and falsely notarized and signed lawyer's name to documents); *In re Shamers*, 873 A.2d 1089 (Del. 2005) (lawyer's failure to supervise firm bookkeeping enabled nephew to embezzle funds); *In re Avant*, 603 S.E.2d 295 (Ga. 2004) (lawyer failed to supervise office assistant who conducted real estate closings and prepared settlement documents containing inaccurate information); *In re Cartmel,* 676 N.E.2d 1047 (Ind. 1997) (lawyer failed to supervise paralegal who placed misleading advertisement in newspaper where it ran five times before being discovered; lawyer also "abdicated many day-to-day functions of his legal office to legal assistants without adequately supervising them"); *In re Mopsik*, 902 So. 2d 991 (La. 2005) (lawyer turned over full responsibility for case to paralegal, who then represented client in court, presented judge with pleading she had prepared purporting to contain lawyer's signature, and failed to inform judge of preexisting restraining order against client); *In re Kaszynski*, 620 N.W.2d 708 (Minn. 2001) (immigration lawyer gave legal assistant unsupervised responsibility for client files and allowed him to interview clients, complete INS forms, have ongoing communication with clients, and advise clients on legal fees, remedies, and procedures, enabling assistant to hold himself out as lawyer and dispense legal advice); *State ex rel. Okla. Bar Ass'n v. Patmon*, 939 P.2d 1155 (Okla. 1997) (lawyer regularly allowed secretary to sign lawyer's name and file court documents without oversight, resulting in filing of misleading motion); *In re Marshall,* 498 S.E.2d 869 (S.C. 1998) (lawyer delegated complete operation of office to office manager, who retained clients and embezzled trust funds without lawyer's knowledge); *see also In re Stein*, 916 So. 2d 774 (Fla. 2005) (lawyer permitted disbarred New York lawyer, not licensed in Florida and having no other connection with case or clients, to sign lawyer's name on court documents as attorney of record; "lawyers must adequately inform themselves as to the credentials and competence of those they authorize to perform any part of the representation of a client using the lawyer's name and license").

However, the mere fact of employee misconduct, without more, does not necessarily constitute a violation of Rule 5.3. *See, e.g., People v. Milner*, 35 P.3d 670 (Colo. O.P.D.J. 2001) (paralegal's single outburst telling client to "stop calling and bit*hing,"

although "lacking in tact," could not form basis for Rule 5.3(b) violation); *Statewide Grievance Comm. v. Pinciaro*, No. CV 970396643S, 1997 WL 155379 (Conn. Super. Ct. Mar. 21, 1997) (unpublished) (misconduct of nonlawyer employee who took kickback from client when distributing settlement check did not, in itself, amount to ethical violation by lawyer who did not authorize, approve, or even suspect such conduct; no evidence presented about what lawyer should have done differently); *Attorney Grievance Comm'n v. Ficker*, 706 A.2d 1045 (Md. 1998) (nonlawyer assistant failed to timely convey client's message to lawyer that she would be out of town on scheduled trial date, resulting in bench warrant being issued against client; court "not prepared to conclude, on this record, that one missed communication, even though significant, constitutes a violation of . . . Rule 5.3").

SUPERVISION OF TRUST ACCOUNT MANAGEMENT

Courts view holding money in trust for clients as a nondelegable fiduciary responsibility that cannot be excused by someone else's ignorance, inattention, incompetence, or dishonesty. Although lawyers may employ nonlawyers to assist in fulfilling this fiduciary duty, lawyers must provide adequate training and supervision to ensure that ethical and legal obligations to account for client funds are being met. When it comes to handling client funds, "there must be some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently." *In re Cater*, 887 A.2d 1 (D.C. 2005) (lawyer failed to provide adequate supervision of secretary who embezzled over $47,000 from estates for which lawyer was court-appointed guardian and conservator). *See, e.g., In re Struthers*, 877 P.2d 789 (Ariz. 1994) (lawyer abandoned responsibility for law office; did not screen, instruct, or supervise nonlawyer employees, and signed pages of blank checks for employees to complete in his absence, thus allowing nonlawyers to decide whether and how much to pay clients from their trust accounts); *In re Bailey*, 821 A.2d 851 (Del. 2003) (managing partner of law firm has "enhanced duties" to ensure firm's compliance with recordkeeping obligations under ethics rules); *Curtis v. Ky. Bar Ass'n*, 959 S.W.2d 94 (Ky. 1998) (lawyer's office manager/secretary/bookkeeper, who was also lawyer's spouse, used trust account check to purchase dog, reimbursing account a few days later); *Attorney Grievance Comm'n v. Zuckerman*, 872 A.2d 693 (Md. 2005) (lawyer failed to instruct employees on proper management of trust account and failed to review their work); *In re Kaszynski*, 620 N.W.2d 708 (Minn. 2001) (lawyer who gave legal assistant unsupervised responsibility for client matters enabled assistant to steal clients' money by forging trust account checks and client money orders); *In re Stransky*, 612 A.2d 373 (N.J. 1992) (lawyer improperly delegated signatory power over trust account and failed to supervise account from which secretary/bookkeeper would "borrow" client funds to pay office bills); *In re Duboff*, 799 N.Y.S.2d 92 (App. Div. 2005) (five-year suspension for lawyer who turned over full control of trust accounts to nonlawyer); *Disciplinary Counsel v. Ball*, 618 N.E.2d 159 (Ohio 1993) (lawyer inadequately supervised bookkeeper who embezzled money from client trust accounts over ten-year period); *State ex rel. Okla. Bar Ass'n v. Mayes*, 977 P.2d 1073 (Okla. 1999) (lawyer's lax supervision allowed nonlawyer office manager to commingle and convert client funds).

Subsection (c): Ordering, Ratifying, or Failing to Rectify Wrongful Conduct of Nonlawyers

A lawyer who directs or ratifies a nonlawyer assistant's misconduct—that is, conduct that would violate the ethics rules if engaged in by the lawyer—is answerable in discipline for that misconduct. If the lawyer is a partner or manager, or is the nonlawyer's supervisor, it is enough that the lawyer knew about the misconduct "at a time when its consequences [could have been] avoided or mitigated" and failed "to take reasonable remedial action." *See, e.g., In re Lassen*, 672 A.2d 988 (Del. 1996) (lawyer directed accounting personnel to charge fictitious billable time to clients' accounts); *In re Moore*, 704 A.2d 1187 (D.C. 1997) (lawyer's blanket authorization of all banking transactions of office manager/spouse resulted in commingling of client funds with third-party funds, misappropriation, and failure to pay third-party creditors of client on time); *In re Scott*, 739 N.E.2d 658 (Ind. 2000) (lawyer failed to supervise disbarred lawyer, hired as paralegal, who engaged in unauthorized practice of law, neglected client matters, and failed to communicate adequately with clients); *State ex rel. Okla. Bar Ass'n v. Taylor*, 4 P.3d 1242 (Okla. 2000) (lawyer ratified conduct of wife/office manager who improperly endorsed client's settlement checks); *see also Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) (law firm disqualified for lawyers' failure to make reasonable efforts to ensure that paralegal did not review privileged materials on computer disk provided by opposing party in response to discovery request; despite contention that lawyers did not know of privileged materials until notified by opposing counsel, court found that "upon requesting the [disk] and learning that it contained every e-mail from [plaintiff's] hard drive, [the law firm] had constructive knowledge that the [disk] contained privileged e-mail"; thus, lawyers' "failure to take steps to prevent the review of privileged information or remediate the effect of the review by removing [the paralegal] from further contact with the case is a violation of [Rule] 5.3(c)").