

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

1. Current Kentucky Rule with Official Comments:

SCR 3.130(5.3) Responsibilities regarding nonlawyer assistants

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

(a) A partner 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 only if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner 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.

Supreme Court Commentary

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 should 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. Proposed Kentucky Rule with Official Comments:

SCR 3.130(5.3) Responsibilities regarding nonlawyer assistants

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

(a) 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 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 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~~ the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) ~~The~~ 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.

~~Supreme Court Commentary~~ 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 ~~should~~ 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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The Committee adopted the MR as recommended by the Commission. The ABA Reporter's Explanation of Changes to MR 5.3 expresses the Committee's view for those changes. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 5.3

TEXT:

Paragraphs (a) and (c)(2): Modify to apply to lawyers with managerial authority comparable to that of partner

As with Rule 5.1, this change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal service organizations, as well as to partners in private law firms. No change in substance is intended.

COMMENT:

[1] "[S]hould" has been replaced with "must" in the third sentence because the duty to give appropriate instruction and supervision is mandatory.

[2] This Comment distinguishes the responsibility to create law firm systems imposed by paragraph (a) from the supervisory responsibility addressed in paragraph (b) and the personal responsibility of managing and supervisory lawyers for the specific misconduct of nonlawyer employees as addressed in paragraph (c).

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 5.3 from MR 5.3.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.