

Vermont Rules of Professional Conduct
Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants

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*This unofficial version was last updated on **November 14, 2022.***

Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 5.3 was amended in 2022. Comments 3 and 4 were added. They took effect on 11/14/22.

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.

[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 regarding 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.

Board's Note—2022 Amendment

Comments 3 and 4 are new and are taken from the ABA Model Rules of Professional Conduct. The new comments address the fact that it has become increasingly common for lawyers to contract for services with persons and entities who are not employed by the lawyer or the lawyer's firm, including vendors who store information related to the representation of a lawyer's client. Lawyers must be mindful of the duty to ensure that nonlawyer assistants act in a way that comports with a lawyer's professional obligations and responsibilities.

Reporter's Notes — 2009 Amendment

V.R.P.C. 5.3 is amended to conform to the changes in Model Rule 5.3. The ABA Reporter's Explanation is as follows:

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).

Reporter's Notes

There is no direct counterpart to this rule in the Vermont Code. DR 4-101(D) provides that a lawyer "shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client." DR 7-107(J) provides that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107."

Rule 5.3 recognizes the expanding role of nonlawyers in the legal field. The rule imposes obligations in addition to those contained in the Vermont Code. In addition to merely exercising care to prevent the disclosure of client confidences or the making of prohibited extrajudicial statements by employees and associates, lawyers under the rule must also see that the firm takes measures to assure that the conduct of nonlawyers in the firm is compatible with the lawyer's professional obligations. Under certain conditions, a lawyer is responsible for the unprofessional conduct of a nonlawyer in the firm.