905 - Fulfilling the Duties of a Managing Attorney Under the Rules of Professional Responsibility

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He is currently chair of the Maine State Bar Association CLE Committee and is a frequent lecturer at ethics continuing legal education seminars. Other recent speaking engagements include the Defense Research Institute ERISA Conference, and the Academy of Legal Studies in Business Annual Meeting. He is an adjunct instructor of Business Law at Saint Joseph's College, and provides pro bono litigation services to low-income domestic violence victims as attorney with the Domestic Violence Pro Bono Litigation Panel.

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Marillyn Fagan Damelio has practiced law over 25 years. Marillyn practiced criminal law with the Cuyahoga County, Ohio Public Defender's Office focusing on the defense of capital crimes. Marillyn joined Nationwide Mutual Insurance Company Trial Division representing Nationwide insureds and the company.

Marillyn served as a Managing Attorney for three Ohio offices and as regional attorney for Ohio and West Virginia before assumimg her current role leading the audits, ethics, training, initiatives and administrative role for Nationwide Trial Division's sixty- three offices around the country. She has tried over 100 jury trials in state and federal courts and is a certified NITA instructor.

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RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

A. *Summary of Rule 5.1.*

1. **Partners in a law firm**. A partner, or lawyer with similar managerial authority, in a law firm must make "reasonable efforts" to ensure that the firm has in place measures providing "reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

2. **Lawyers with direct supervisory authority over another lawyer**. A lawyer who has "direct supervisory authority over another lawyer" is required to make "reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

3. **Responsibility for another lawyer's misconduct**. Rule 5.1 provides that a lawyer "shall be responsible for another lawyer's violation of the Rules of Professional Conduct if":

> (a) the lawyer orders the conduct that is a violation;
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> (b) the lawyer, "with knowledge of the specific conduct," ratifies the conduct of another attorney; or
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> (c) a supervisory lawyer knows of conduct at a time "when its consequences could be avoided or mitigated," but the supervisory lawyer "fails to take reasonable remedial action."

B. *Discussion of Rule 5.1 Issues*.

1. **Rule 5.1 applies to more than "partners" in "law firms**." Although Rule 5.1 speaks in terms of "partners" in "law firms," the Comment accompanying the rule explains that it applies to all "lawyers who have managerial authority over the professional work of a firm," and applies to a:

> --partnership;
> --professional corporation;
> --an association authorized to practice law;
> --legal services organization; or
> --law department of an enterprise or government.

Rule 1.0 defines "law firm" and "firm" as:

> [A] lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

The Comment accompanying Rule 1.0 says that "there is ordinarily no question that members of the [law] department constitute a firm within the meaning of the Rules of Professional Conduct." It adds, however, that "[t]here can be uncertainty...as to the identity of the client." For example:

> --"[W]hether the law department of a corporation represents a subsidiary or an affiliated corporation;" and
> --Depending on the structure of a legal services organization, the organization and its various components may be one large firm of different firms for purposes of Rule 1.0.

The above commentary address the issue of firms with multiple component parts in the context of determining the "client." Similar issues may arise in the context of determining the scope of a supervisory lawyer's responsibilities under Rule 5.1, depending on the structure of the organization.

2. **What is reasonable?** The word "reasonable" is used several times in Rule 5.1, which requires "reasonable efforts" to ensure the firm has a "reasonable assurance" that its lawyers comply with the rule. In addition, a lawyer may face responsibility for another lawyer's violation of the rules if the lawyer fails to take "reasonable remedial action" in response to conduct of another attorney. Rule 1.0 defines "reasonable," when used in describing conduct by an lawyer, as "the conduct of a reasonably prudent and competent lawyer."

The Comment says that "reasonable efforts" to establish measures to provide "reasonable assurance" of compliance could include policies to:

> --Detect and resolve conflicts of interest;
> --Identify dates by which action must be taken on pending matters;
> --Account for client funds; and
> --Ensure that inexperienced lawyers are properly supervised.

It goes on to provide that additional examples of "reasonable efforts" depend on the size of the firm and the nature of its practice. A small firm with experienced lawyers may rely on more informal measures. In a large firm, or practices where difficult ethical situations arise, more elaborate measures may be required. The Comment notes that some firms have programs under which junior lawyers can refer ethical questions to a senior partner or ethics committee.

The Comment explains that firms of all sizes may rely on continuing legal education in professional ethics as a way to demonstrate "reasonable efforts" to establish measures to provide "reasonable assurance" of compliance.

3. **Responsibility for the misconduct of another lawyer**. The Comment states that whether an lawyer has supervisory authority in a particular matter is a question of fact. In some instances, the lawyer has indirect authority and in other cases there is immediate supervisory authority. The Comment says that the appropriate remedial action for the partner or managing lawyer depends on the immediacy of that lawyer's supervisory authority as well as the seriousness of the misconduct. The rule provides that a partner is "required to intervene" to prevent avoidable consequences if (a) the partner knows of the misconduct and (b) the consequences of that misconduct can be prevented. The Comment illustrates an application of Rule 5.1 by saying that if a supervising lawyer knows that a subordinate lawyer misrepresented a matter to the opposing party, the supervisor, as well as a subordinate lawyer, have an obligation to correct the misapprehension.

4. **Cases interpreting Rule 5.1.**

In *Matter of Yacavino*[1], the New Jersey Supreme Court upheld a state disciplinary board's suspension of an attorney for "grave misconduct" in neglecting a relatively straight-forward matter and then attempting to cover it up. The Court upheld the suspension but went on to comment about a "disturbing aspect" of the case; namely, that the attorney in question "was left virtually alone and unsupervised in the year he rendered service at the firm's...office." The Court noted that "had this young attorney received the collegial support and guidance expected of supervising attorneys, this incident might never have occurred." The Court did not sanction the firm because they were not named in the complaint and because it "would not credit [the statement about the attorney being unsupervised] without first hearing from the firm." But the Court cautioned that "in the future...this attitude of leaving new lawyers to 'sink or swim' will not be tolerated."

Four years later, in *Matter of Ritger*[2], the New Jersey Supreme Court was again called upon to address the responsibilities of a law firm to supervise its attorneys. After noting that the "ethical derelictions [of the attorney in question] are painfully apparent," the Court said "we do not wish to be unfair to the firm," noting that its members did not testify at the hearing. As a result, "the record does not fully disclose what efforts were made to oversee [the respondent's] work." Nevertheless, the Court expressed its "unease over the extent to which the supervising firm carried out its end of the arrangement." Although it did not sanction the firm, it went on to say that it will use the occasion of this case as an "opportunity to remind the bar that when lawyers take on the significant burdens of overseeing the work of other lawyers, more is required than that the supervisor simply be 'available.'"

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[1] *Matter of Yacavino*, 100 N.J. 50, 494 A.2d. 801(N.J. 1985).
[2] *Matter of Ritger*, 115 N.J. 50, 556 A.2d 1201 (N.J. 1989).

In a case not involving ethical sanctions, a Federal District Court in California[3] commented on the "disturbing and inexcusable" conduct by a partner in a law firm, that lead to imposition of financial sanctions under Rule 11. The Court noted that under ABA Model Rule of Professional Conduct 5.1 (a):

> [T]he ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the rules.

The Court went on to say that:

> [G]iven what occurred [in this particular case] it is incumbent upon [this particular firm] as well as other firms to recognize that they are, in large part, responsible for maintaining an environment in which ethical transgressions such as those which occurred in this case will not be tolerated.

In considering a "voluminous" record on appeal, the Supreme Court of Alabama[4] upheld the imposition of sanctions on a law firm for, among other things, failing to undertake reasonable efforts to ensure that the lawyers in their firm conformed to the Model Rules of Professional Conduct. In this particular case, the Court noted that "in an effort to turn over a huge volume of cases, [the attorneys] neglected their clients and imposed policies on associate attorneys that prevented the attorneys from providing quality and competent legal services."

In *Matter of Farmer*[5], the Supreme Court of Kansas indefinitely suspended an attorney for a large number of alleged ethical violations, including failing to carry out his responsibility under Rule 5.1 to supervise the inexperienced attorneys he hired. The Court found that the Respondent failed to comply with his responsibility "for supervising, training, educating, reviewing and otherwise mentoring [these] inexperienced attorneys...." The Court specifically noted that "Respondent did not use reasonable efforts to ensure that they complied with [the Rules of Professional Responsibility] and were knowledgeable about the court rules."

The Supreme Court of South Carolina[6] upheld imposition of sanctions on an attorney for among other things, failing to ensure his "associate was appropriately responding to discovery requests...." The Court said that under Rule 5.1 "it was [the lawyer's responsibility] to ensure his associate was appropriately responding to discovery requests."

[3] *In re Omnitrition Intern. Securities Litigation*, 1995 WL 626529 (N.D. Cal. 1995) (Not Reported in F. Supp.)
[4] *Davis v. Alabama State Bar*, 676 So.2d 306 (Ala 1996).
[5] *Matter of Farmer*, 263 Kan. 531, 950 P.2d 713 (Kan. 1997).
[6] *Matter of Moore*, 329 S.C. 294, 494 S.E.2d 804 (S.C. 1997).

In upholding the indefinite suspension of an attorney, a Maryland Court of Appeals[7] found, among other things, that an attorney failed to properly supervise an inexperienced attorney who was handling a complex drunk driving case. The inexperienced attorney "had begun employment that week and had never tried a jury case...." Although the respondent discussed the case with the inexperienced attorney the night before the trial, the discussion only lasted about three to five minutes.

5. **Ethics opinions interpreting Rule 5.1**

The New York State Bar Association Committee on Professional Ethics (the "Committee") issued an opinion in 2003 discussing the responsibility of supervisory lawyers with respect to affiliated lawyers licensed in foreign countries.[8] The Committee noted that the New York Lawyer's Code of Professional Responsibility (the "Code") permits New York lawyers to enter into partnerships with lawyers who are admitted to practice in other jurisdictions, even though those lawyers may be bound by ethics rules other than the Code.

The Committee clarified that New York law firms are required to make reasonable efforts to ensure that any lawyer in the firm who is subject to the Code complies with New York ethics rules. There is, however, no requirement that New York firms ensure compliance with the Code by affiliated lawyers who are not otherwise subject to the Code.

The ABA Standing Committee on Ethics and Professional Responsibility (the "Standing Committee") has issued several Formal Opinions that deal in whole or part with Rule 5.1. For example, in Formal Opinion 88-346[9], the Standing Committee addressed legal issues related to the use of "temporary lawyers." It stated:

> [T]he supervising lawyers with the firm also have an obligation to make reasonable efforts to ensure that the temporary lawyer conforms to the rules of professional conduct, including those governing the confidentiality of information relating to representation of a client.

In a 2001 opinion regarding partnerships with foreign lawyers[10], the Standing Committee stated that "responsible lawyers in U.S. law firms must, in accordance with Rule 5.1, make reasonable efforts to ensure that client information respecting matters in their U.S. offices is protected...."

In a 2003 Formal Opinion[11] regarding the impact of Rule 5.1 on mentally impaired lawyers, the Standing Committee said that "impaired lawyers have the same obligations under the Model Rules as other lawyers." It went on to say that "when a supervising

[7] *Attorney Grievance Commission of Maryland v. Fickler*, 349 Md. 13, 706 A.2d 1045 (Md. 1998).
[8] NYSBA Formal and Informal Ops., Op. 762 (2003).
[9] ABA Formal Op.; Formal Op. 88-346, Temporary Lawyers.
[10] ABA Formal Op.; Formal Op. 01-423, Forming Partnerships With Foreign Lawyers.
[11] ABA Formal Op.; Formal Op. 03-429, Obligations with Respect to Mentally Impaired Lawyer in the Firm.

lawyer knows that a supervised lawyer is impaired, close scrutiny is warranted because of the risk that the impairment will result in violations." It adds that "some impairments may be accommodated" but cautions that "management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm."

The opinion notes that if a law firm has undertaken "reasonable efforts" to "assure compliance with the Model Rules," neither the supervisory attorney nor the other partners in a firm are responsible for an impaired lawyer's violation of the Model Rules "unless they knew of the conduct at a time when the consequences could have been avoided or mitigated and failed to take reasonable remedial action."

A 2006 Formal Opinion[12] discussed the ethical obligations of attorneys with excessive caseloads who represent indigent criminal defendants. The Standing Committee said that it is "essential" that the supervising attorney monitor and ensure the appropriateness of workloads, taking into account the complexity of the case, the resources available to the attorney, the attorney's experience level and any non-representational duties of the subordinate lawyer. It goes on to state that if a subordinate lawyer's workload is excessive "the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients."

In another 2006 Formal Opinion[13] regarding ethical issues related to metadata, the Standing Committee stated that Rule 5.1 requires a supervising lawyer to "act competently" to guard against inadvertent or unauthorized disclosure of client information.

[12] ABA Formal Op.; Formal Op. 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation.
[13] ABA Formal Op.; Formal Op. 06-442, Review and Use of Metadata.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

A. *Summary of Rule 5.3.*

1. **Partners in a law firm**. A partner, or lawyer with similar managerial authority, in a law firm shall "make reasonable efforts" to ensure that the firm has measures in place to provide "reasonable assurance" that the conduct of a nonlawyer employed, retained or associated with a firm is "compatible with the professional obligations of the lawyer."

2. **Lawyers with direct supervisory authority over nonlawyers.** A lawyer with direct supervisory authority over a nonlawyer is required under Rule 5.3(b) to make "reasonable efforts" to ensure that the conduct of a nonlawyer employed, retained or associated with the lawyer is "compatible with the professional obligations of the lawyer."

3. **Responsibility of a lawyer for conduct of a nonlawyer employed, retained or associated with a lawyer.** A lawyer is responsible for the conduct of a nonlawyer employed, retained or associated with the lawyer if the conduct would be a violation if engaged in by the lawyer and if the lawyer:

> (a) orders the conduct;
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> (b) "with knowledge of the specific conduct" ratifies the conduct; or
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> (c) "knows of the conduct at a time when its consequences could be avoided or mitigated but fails to take reasonable remedial action."

B. *Discussion of Rule 5.3 Issues.*

1. **Rule 5.3 applies to more than "partners" in "law firms**." Although Rule 5.3 speaks in terms of "partners" in "law firms," the Comment accompanying the rule explains that it applies to all "lawyers who have managerial authority over the professional work of a firm," and applies to a:

> --partnership;
> --professional corporation;
> --an association authorized to practice law;
> --legal services organization; or
> --law department of an enterprise or government.

Rule 1.0 defines "law firm" and "firm" as:

> [A] lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

The Comment accompanying Rule 1.0 says that "there is ordinarily no question that members of the [law] department constitute a firm within the meaning of the Rules of Professional Conduct." It adds, however, that "[t]here can be uncertainty...as to the identity of the client." For example:

> --"[W]hether the law department of a corporation represents a subsidiary or an affiliated corporation;" and
> --Depending on the structure of a legal services organization, the organization and its various components may be one large firm of different firms for purposes of Rule 1.0.

The above commentary address the issue of firms with multiple component parts in the context of determining the "client." Similar issues may arise in the context of determining the scope of a supervisory lawyer's responsibilities under Rule 5.3, depending on the structure of the organization.

2. **Scope of "nonlawyer assistants."** The Comment accompanying Rule 5.3 states that nonlawyer assistants include "secretaries, investigators, law student interns, and paraprofessionals."

3. **Training**. A lawyer is required under Rule 5.3 to provide nonlawyer assistants with instruction regarding ethical aspects of their employment, "particularly regarding the obligation not to disclose information relating to representation of the client." The Comment goes on to say that the nature of the training provided to nonlawyer assistants must take into account the fact that they do not have formalized legal training and are not subject to professional discipline.

4. **What is reasonable?** The word "reasonable" is used several times in Rule 5.3, which requires "reasonable efforts" to ensure the firm has a "reasonable assurance" that its nonlawyers act in a manner that is consistent with the professional obligations of the lawyer. In addition, a lawyer may be responsible for the actions of an employed or retained nonlawyer if the lawyer fails to take "reasonable remedial action" in response to the conduct of that person.

Rule 1.0 defines "reasonable" when used in describing conduct by a lawyer as "the conduct of a reasonably prudent and competent lawyer."

The Comment provides that in developing "reasonable efforts" to provide "reasonable assurance" of compliance with Rule 5.3, a lawyer should look to the Comment accompanying Rule 5.1 for examples of "reasonable" practices to ensure "reasonable" compliance.

5. **Cases interpreting Rule 5.3**.

In a 1992 decision[1], the Supreme Court of New Jersey held that "no rational basis exists" for the New Jersey Committee on the Unauthorized Practice of Law to treat paralegals who are independent contractors differently than paralegals who are employees of a firm. The Court noted that although paralegals have an obligation to ensure that they comply with rules governing the unauthorized practice of law, "the attorney is ultimately accountable." The Court went on to say: "with great care, the attorney should ensure that the legal assistant is informed of and abides by the provisions of the Rules of Professional Responsibility."

The Ohio Supreme Court[2] considered a number of ethical issues arising under an attorney's alleged failure properly to supervise an employee. The employee in question started off as the attorney's secretary, but assumed greater responsibility over the course of a number of years. The employee mismanaged and became delinquent in a number of probate and guardianship matters, and then redirected office mail such that the attorney was not aware of the mismanagement. In addition, the employee embezzled approximately $200,000 in funds from estate and guardianship accounts. In finding violations of ABA Model Rule 5.3, the Curt said that the attorney:

> [R]elinquished significant aspects of his... practice to [the employee] and failed to set up any safeguards to ensure proper administration of the matters entrusted to him by clients. Delegation of work to nonlawyers is essential to the efficient operation of any law practice. But, delegation of duties cannot be tantamount to the relinquishment of responsibility by the lawyer. Supervision is critical in order that the interests of clients are effectively safeguard.

The Arizona Supreme Court[3] upheld disbarment of an attorney who was sanctioned for numerous ethical violations, including the failure to supervise nonlawyer employees. The Court began by noting that "lawyers are often responsible for the actions of their nonlawyer assistants." It went on to observe that the attorney in this case "virtually abandoned responsibility for running his office" to his nonlawyer assistants, who were later described by the Arizona Disciplinary Commission as "incompetent and untrustworthy." The attorney gave the nonlawyer assistants "total control of his office and unfettered access to his trust account. He exercised no oversight...." The attorney also violated Rule 5.3 "by knowingly ratifying many of [the employees'] ethical lapses and by failing to mitigate their consequences."

The Arkansas Supreme Court[4] upheld a reprimand of an attorney by that state's Committee on Professional Conduct because "there was substantial evidence that [the attorney] had provided inadequate supervision over the manner in which his assistant [handled a] claim." In reaching this decision the Court observed that while "it is clear that...a lawyer may delegate certain tasks to his assistants, he or she, as supervising

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[1] *In re Opinion No. 24 of Committee on Unauthorized Practice of Law*, 128 N.J. 114, 607 A.2d 962 (N.J. 1992).
[2] *Disciplinary Counsel v. Bell*, 67 Ohio St. 3d 401, 618 N.E.2d 159 (Ohio 1993).
[3] *Matter of Struthers*, 179 Ariz. 216, 877 P.2d 789 (Ariz. 1994).
[4] *Mays v. Neal*, 327 Ark. 302, 938 S.W. 830 (Ark. 1997).

attorney, has the ultimate responsibility for compliance by the non-lawyer with the applicable provisions of the Model Rules."

The Supreme Court of Indiana[5] upheld a 60-day suspension for an attorney who was charged with a number of ethical violations, including the failure to adequately supervise his nonlawyer staff. Specifically, the lawyer failed to supervise a legal assistant's placement of an advertisement that contained misleading, unfair and self-laudatory language that violated the Indiana Rules of Professional Conduct. In addition, the lawyer failed "to ensure that his nonlawyer staff's conduct was compatible with the [lawyer's] professional obligation to diligently pursue client matters and keep the client adequately informed about the status of her affairs." The Court observed that there were some extenuating and mitigating circumstances, but it was clear that the lawyer:

> abdicated many of the day-to-day functions of his legal practice to legal assistants without adequately supervising their work product or activities. Lawyers should give legal assistants appropriate instruction and supervision concerning legal aspects of their employment, taking into account the fact that they do not have legal training.[6]

In *State ex. Rel. Oklahoma Bar Ass'n v. Patmon,*[7] the Supreme Court of Oklahoma found clear and convincing evidence that an attorney had engaged in misconduct for, among other things, failing to supervise nonlawyer assistants. The court imposed a two-year and one-day suspension from the practice of law--with two justices of the Oklahoma Supreme Court dissenting on the grounds that they would disbar the attorney--based on several instances of misconduct, one of which was a violation of Rule 5.3. After noting that the Rule requires that attorneys who supervise nonlawyers make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the attorney's ethical obligations, the Court said that the attorney "violated this Rule by, according to her own testimony, permitting her secretary to file a misleading motion."

The Kansas Supreme Court found clear and convincing evidence of several ethics violations in a 2000 decision *In re Kellogg*.[8] After indicating that Rule 5.3 "requires a lawyer to make reasonable efforts to ensure that a nonlawyer assistant's conduct and training is compatible with the lawyer's obligation," the Court added that Rule 5.3 "may be violated by a lack of training [the nonlawyer staff]."

In another Kansas Supreme Court decision[9], the Court censured an attorney for, among other things, failing to ensure that a nonlawyer assistant's conduct was compatible with the attorney's conduct under the Rules of Professional Responsibility. The lawyer hired a disbarred attorney and "treated [him] as though he were a partner or associate, rather than a law clerk. Because [the disbarred attorney] had been convicted of a felony crime of

[5] *Matter of Cartmel*, 676 N.E.2d 1047 (Ind. 1997).
[6] Id.
[7] 939 P.2d and 155 (Okla. 1997).
[8] 269 Kan. 143, 4 P.3d 594 (Kan. 2000).
[9] *In the Matter of Stanley R. Juhnke*, 273 Kan. 162, 41 P.3d 855 (Kan. 2002).

dishonesty, the [attorney] should have supervised [the disbarred attorney's] conduct to ensure that the...clients were adequately safeguarded."

6. **Ethics opinions interpreting Rule 5.3.**

In March 2005, the Massachusetts Bar Association House of Delegates approved an ethics opinion that addressed, in part, the obligations of a law firm under Rule 5.3 with respect to use of a third-party vendor for computer support and maintenance.[10] The opinion indicated that although a firm may retain the services of a third-party vendor, Rule 5.3 requires the firm to "make reasonable efforts to ensure" that the vendor's conduct is compatible with the lawyers' professional obligations, and in particular the lawyers' obligation to maintain the confidentiality of client records.

The opinion went on to provide the following examples of "reasonable efforts" on the part of the firm with respect to retention of a third-party software maintenance vendor:

> --Notifying the vendor of the confidential nature of the information stored on the firm's servers and in its document database;
> --Examining the vendor's existing policies and procedures with respect to handling of confidential information;
> --Obtaining written assurance from the vendor that confidential client information on the firm's computer systems will only be utilized for technical support purposes and will be accessed only on an "as needed" basis;
> --Obtaining written assurance from the vendor that the confidentiality of all client information will be respected and preserved by the vendor and its employees; and
> --Drafting and agreeing upon additional procedures for protecting any particularly sensitive client information that may reside on the firm's computer system.

An Arizona State Bar opinion in 2001 addressed Rule 5.3 in the context of a law firm entering into a contract with an agency to help clients qualify for state benefits.[11] It noted that Rule 5.3 "sets forth stringent oversight and supervision requirements when an attorney proposes to be associated with a nonlawyer for the provision of legal advice." In discussing whether the supervisory procedures established by a firm are "reasonable," the opinion referenced the Arizona Supreme Court decision in the *Matter of Galbasini*,[12] in which the Court quoted from Hazard & Hodes, *The Law of Lawyering*, as follows:

> "Reasonable" Supervisory Efforts
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> An attorney who supervises a nonlawyer associate is not required to guarantee that the associate will never engage in "incompatible" conduct, for that would be tantamount to vicarious liability. On the other hand, if a supervising lawyer takes no precautionary steps at all, he or she violates Rule 5.3 [regardless of whether the nonlegal associates misbehave].

[10] Mass. Bar Association, House of Delegates, Op. 05-04 (2005).
[11] State Bar of Arizona, Formal and Informal Ops., 2001-11.
[12] 163 Ariz. 120, 786 P.2d 971 (1990).

> Circumstances will dictate what constitutes an "reasonable effort" to instill in nonlawyer personnel an appropriate respect for their duties. Certainly new personnel must be carefully screened and given at least some instruction on the fundamentals of professional responsibility.

The opinion also cites the 1994 Arizona Supreme Court decision in *Matter of Struthers*[13] in which the court held: "although there may often be some question of what is a reasonable effort to ensure proper conduct by nonlawyer employees, at a minimum the lawyer must screen, instruct and supervise."

In a 2000 ethics opinion[14], the Arkansas Bar Association discussed ethical issues arising when a group of nonlawyers plans to establish a land title company in which one lawyer would be present in the office one day a week to provide legal services. The opinion posits three caveats with respect to obligations under Rule 5.3:

> 1. "The attorney must have control and authority over the assistants." It specifically notes that "unless the relationship between the attorney and the paraprofessionals is that of employer-employee (or comparable relationship), the attorney may lack sufficient control to ensure professional standards."
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> 2. "The attorney must actually exercise control. The attorney is to give appropriate instruction to assistants concerning their responsibilities and supervise, as well, the ethical aspects of their employment... [w]e note that the [Arkansas] Supreme Court...[has] disciplined attorneys for the lax control and supervision of employees."
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> 3. "No rule requires the attorney to be physically present in the office a prescribed number of hours. No rule expressly prohibits an employee from signing, with clear permission, the name of the attorney. But the risks are great."

The Connecticut Bar Association Committee on Professional Ethics issued an opinion in 2000[15], discussing the "variety of obligations" Rule 5.3 imposes in the context of disqualification. The opinion notes that the "conduct compatible with the professional obligations of the lawyer means not disclosing, intentionally or inadvertently, information relating to representation of the former client on the same or substantially related matter." It goes on to say:

> As the number of nonlawyer assistants in law firms grows and as nonlawyers play an increasingly larger role in assisting lawyers to carry out their professional obligations, firms might wish to consider adopting, in advance, policies and procedures not only for the specific situation addressed by this Opinion, but also to satisfy the requirements of Rule 5.3 in general.

[13] 179 Ariz. 216, 877 P.2d 789 (1994).
[14] Ark. Bar Association, Adv. Op., 2000-01 (2000).
[15] Conn. Bar Association Committee on Professional Ethics, Inf. Op., 00-23 (2000).

A 2000 Massachusetts ethics opinion discussed the supervisory responsibility of lawyers under Rule 5.3 with respect to use of paralegals in litigation.[16] The opinion stated that whether certain litigation-related work may be performed by a paralegal is a "fact-intensive judgment" for the lawyer. It added that "if the lawyer has a reasonable basis to believe that the [particular litigation-related work] presents too complicated a task for the paralegal to perform competently, then the lawyer's ethical obligations...compel the lawyer not to delegate the task."

In a 1995 Formal Ethics Opinion[17], the ABA Standing Committee on Ethics and Professional Responsibility (the "Committee") considered a number of issues relating to communication with represented parties, including communication by investigators.

After noting that "use of investigators in civil and criminal matters is normal and proper," the Committee noted that "when the investigators are directed by lawyers, the lawyers may have ethical responsibility for the investigator's conduct." The Committee said that when a lawyer has direct supervisory responsibility over an investigator, the lawyer may be responsible for the investigator's contacts with represented parties:

> If the lawyer instructed the investigator to make the conduct; or
>
> If the lawyer knew that the investigator planned to contact a represented party but failed to instruct the investigator not to do so.

Also in 1995[18], the Committee considered ethical issues arising when a lawyer gives a computer maintenance company access to his or her computer files for purposes of ongoing maintenance of the computer system. The Committee said that under such circumstances the lawyer must "make reasonable efforts to ensure that the [service providing vendor] has in place, or will establish, reasonable procedures to protect the confidentiality of client information." The Committee went on to note that the issues arising in the context of computer maintenance are similar to issues that arise with respect to other outside agencies that lawyers and law firms use, including: accounting, data processing and storage, printing, photocopying, computer service and paper disposal.

The District of Columbia Bar Legal Ethics Committee issued an opinion in 2003 regarding the responsibilities of attorneys who hire investigators.[19] The Committee stated that an attorney may hire an investigator to interview potential witnesses, but the lawyer must "make reasonable efforts to ensure that the investigator complies with the D.C. Rules of Professional Conduct." These duties include making sure that the prospective witness understands the lawyer's (in this case adversarial) role in the matter, and that the investigator should not attempt to have the prospective witness sign forms regarding release of medical information. In addition, the attorney should take reasonable steps to

[16] Mass. Bar Association, Op. No. 00-4 (2000).
[17] ABA Formal Op. Formal Op., 95-396, Communication with Represented Persons.
[18] ABA Formal Op. Formal Op., 95-398, Access of Nonlawyers to a Lawyer's Database.
[19] District of Columbia, Legal Ethics Committee, Op., No 321 (2003)

ensure that if the investigator believes the witness misunderstands the investigator's role, reasonable affirmative efforts are made to correct the misunderstanding.

In a 1997 ruling that discusses Rule 5.3, the Connecticut Bar Association Committee on Professional Ethics discussed a lawyer's responsibilities in supervising nonlawyer employees.[20] It noted that "negligent supervision of employees handling trust accounts is not an excuse…." It quoted from two court decisions that had previously developed this line of thinking. In *Attorney Griev. Comm'n v. Goldberg*[21], the Court held that "[a]n attorney may not escape responsibility to his clients by blithely saying that any shortcomings are solely the fault of his employee." This reasoning was advanced in *Attorney Griev. Comm. v. Glenn*[22], where the Court held that even if the attorney has reasonable procedures in place, the attorney "must ascertain that his or her employees perform their responsibilities in a competent manner."

[20] Conn. Bar Association, Committee on Professional Ethics, Inf. Op., 97-38 (1997).
[21] 441 A.2d 338, 341 (Md. 1982).
[22] 671 A.2d 453, 473 (Md. 1996).