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Good Help:
Non-Lawyer Assistants—Human *and* Virtual

The U.S. Bureau of Labor Statistics reports that roughly 750,000 people are employed in private sector legal occupations nationally.[1] Of these, about half are lawyers and the other half are nonlawyers.[2] These statistics underscore the critical role nonlawyers play in law firms large and small. RPC 5.3 governs lawyer supervision over human nonlawyer assistants.[3] Emerging non-human "virtual"[4] assistants, by contrast, are presently addressed through a lawyer's duties of competence and confidentiality relevant to technology generally—including technological assistants powered by artificial intelligence. In this column, we'll survey the differing risk management considerations involved with both human and virtual assistants.

Before we do, however, three qualifiers are in order.

First, RPC 5.1(b)-(c) outline supervisory duties over other firm lawyers.[5] Under Comment 5 to RPC 5.3, supervision of limited license legal technicians—"LLLTs"—also falls under RPC 5.1.[6] We'll leave those for another day.

Second, the duties of supervision under RPC 5.3 apply with equal measure to corporate and governmental legal offices.[7] Because both corporate and governmental legal offices are organized somewhat differently than private law firms, we'll also leave those for another day.

Finally, although nonlawyer entities are held to the standard of care for lawyers in Washington for legal malpractice if they offer legal advice,[8] we'll focus on nonlawyers working with in traditional private practice settings.[9]

Human

RPC 5.3 breaks out supervisory duties into three broad categories.[10]

RPC 5.3(a) charges lawyers in firm management with the responsibility for creating an ethical infrastructure through systems and training appropriate to firm size and practice to ensure that nonlawyers understand and comply with the lawyers' obligations under the RPCs:

> [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[.]

RPC 5.3(b) speaks to direct supervision:

> [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[.]

RPC 5.3(c) defines the circumstances when a lawyer will be held responsible for a nonlawyer's conduct:

> [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.

Washington's rule closely parallels its ABA Model Rule counterpart.[11] The latter was adopted by the ABA in 1983.[12] There was no comparable provision in the former ABA Model Code of Professional Responsibility.[13] The ABA rule and the accompanying comments were amended in 2002 to expand "management authority" beyond partners.[14] The ABA rule and comments were further amended in 2012 to highlight that supervisory duties apply both to direct employees and nonlawyers outside a firm who are involved in the firm's work.[15]

The Washington rule followed a similar trajectory. It was adopted in 1985 when Washington moved from the former Code of Professional Responsibility.[16] The Washington rule was amended in 2006 to address "management authority" mirroring earlier changes in this regard to the ABA Model Rule.[17] In 2015 as part of Washington's licensing of LLLTs, a comment was added to Washington RPC 5.3 clarifying that LLLTs are licensed professionals rather than nonlawyers for purposes of the rule.[18] The following year, the text and comments were

amended to generally incorporate (with minor modifications) the ABA's 2012 amendments addressing nonlawyers outside a law firm.[19]

The risks vary with the particular subpart in RPC 5.3.

Because RPC 5.3(a) is focused on the firm as a whole, the consequences are often felt primarily by the firm as well. In *Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000), for example, a paralegal moving laterally between firms on opposite sides of significant commercial litigation was screened from the matter involved shortly after arriving at the other firm rather than before. The paralegal's "old" firm client moved to disqualify the "new" firm—arguing that the firm's screen was too late to be effective. Although the court denied the motion, it was only after depositions of the personnel involved and an evidentiary hearing involving outside counsel. Comment 11 was later added to Washington RPC 1.10 citing *Daines*, cross-referencing RPC 5.3, clarifying that nonlawyer conflicts are imputed to the firm as whole in the same way lawyer conflicts, and, like lawyer conflicts arising from lateral moves, can be addressed through screening. The risk management "take away" from *Daines*, therefore, is that incoming nonlawyers should be evaluated for conflicts in the same way lawyers are.[20]

RPC 5.3(b), in turn, focuses on individual lawyer-supervisors, but also can involve significant consequences to the law firm as a whole. In *Richards v. Jain*,

168 F. Supp.2d 1195 (2001), for example, lawyers with direct supervision over a paralegal failed to instruct the paralegal on what to do if he encountered a litigation opponent's privileged communications when reviewing files their client had provided from his time working as a senior executive of the company he was suing over stock compensation. The paralegal later viewed 972 privileged emails and moved them into the firm's case database. When this all tumbled out later in the wake of the client's deposition, the firm was disqualified for improper invasion of the opponents privilege. In doing so, the court pointed to RPC 5.3(b) and the lawyers' failure to instruct the paralegal.

The risks of failing to supervise can turn starkly personal under RPC 5.3(c). In *In re VanDerbeek*, 153 Wn.2d 64, 101 P.3d 88 (2004), for example, a solo practitioner was disbarred after she learned her office manager was systematically overbilling clients and she failed to take corrective action.

Three related risks also flow from RPC 5.3 taken as whole.

First, firms need to realistically assess whether some tasks are not delegable. Last year, for example, the ABA issued Formal Opinion 506 addressing the role of nonlawyer assistants in client intake. The opinion noted that, with appropriate training, nonlawyers could handle many client intake functions such as obtaining conflict checking information and answering general

questions about the firm's fee agreements. The opinion cautioned, however, that the lawyers remain responsible for understanding clients' specific objectives and answering their specific legal questions.

Second, reflecting the evolution of law practice generally, the duty to supervise applies with equal measure to direct employees and independent contractors and regardless of whether the nonlawyer assistant is down the hall of a "brick and mortar" office or working remotely. ABA Formal Opinion 08-451 (2008) surveys outsourced support services—including supervision. ABA Formal Opinion 498 (2021) and WSBA Advisory Opinion 201601 (rev. 2022) do the same for virtual practice—again including supervision. They all merit careful review by lawyers operating in those environments. In *Montgomery v. Department of Labor and Industries*, 2023 WL 1990549 (Wn. App. Feb. 14, 2023) (unpublished), *rev. denied*, 1 Wn.3d 1019 (2023), the Court of Appeals—citing RPC 5.3(b)—found that miscommunication between a lawyer and his assistant over an appellate filing deadline did not excuse a late filing. ABA statistics updated periodically since the mid-1980s have consistently classified roughly 20 to 25 percent of malpractice claims nationally as "administrative errors"—such as missed deadlines stemming from internal miscommunication.[21] A more

dispersed work force post-pandemic only increases the supervisory challenges in this regard.

Third, while relying on an experienced nonlawyer assistant is understandable, ignoring the duty to supervise is not. *In re Trejo*, 163 Wn.2d 701, 185 P.3d 1160 (2008), involved a solo practitioner whose assistant handled the firm's bookkeeping. Unfortunately for the lawyer, the assistant used the firm's trust account for a personal check-kiting scheme. When the scheme eventually unraveled, the lawyer was not implicated in the thefts. Instead, he was disciplined for failure to supervise, with the Washington Supreme Court observing pointedly:

> [A]lthough . . . [the lawyer] . . . did not know about or participate in . . . [the assistant's] check floating and misappropriation, he knew that he had completely abdicated all responsibility for complying with the ethical requirements of trust accounting to a nonlawyer assistant.[22]

Virtual

Although the full contours of artificial intelligence tools in law practice remain to be written, it would not be surprising if at least some functions handled by human nonlawyers today transition to technological tools in the future.[23] In fact, this march began a long time ago. When I started as an associate at a large law firm, one of the senior partners still dictated letters to his assistant who took

his words down in shorthand. Even then, that was viewed as an anachronism. What will likely change is the pace of replacing at least some human assistants with virtual ones.

As “smart speakers” were introduced over the past decade, they were also suggested as virtual assistants for lawyers. The ABA, state bars, and scholars, however, cautioned that because many such devices are “always listening,” that function should be disabled before they are used in law offices to protect client confidentiality.[24] Although today’s “name brand” smart speakers are general commercial products, it is certainly conceivable that services tailored to the legal profession will emerge that offer contractual assurances of confidentiality consistent with those governing lawyers. By analogy, most lawyers today store their files and manage their electronic communications through third-party vendors offering appropriate contractual assurances of confidentiality.[25]

Under Comment 8 to the competency rule—RPC 1.1—lawyers also have a duty to understand the technology they are using. In a case that produced national headlines last year, a New York lawyer using an AI-powered “chatbot” as what amounted to a brief-writing virtual assistant was sanctioned by a federal court in Manhattan when the chatbot’s brief included multiple citations to non-existent cases.[26] In his defense, the lawyer argued that he didn’t understand

how the chatbot worked. In sanctioning both the lawyer and his law firm, the judge noted pointedly that lawyers must understand the law practice technology they use and that lawyers remain responsible for the work product produced.

In sum, the RPCs do not preclude virtual assistants. But, they do require lawyers to understand them sufficiently to use them competently and to use them in ways that preserve client confidentiality.

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[1] *See* https://www.bls.gov/oes/current/naics4_541100.htm#23-0000.

[2] *Id.*

[3] Some have suggested changing the descriptor "nonlawyer" when referring to assistants. *See* Debra Cassens Weiss, "Should ABA Strike 'Nonlawyer' from Its Vocabulary? Petition Says It's Time," ABA Journal Online at https://www.abajournal.com/news/article/should-the-aba-strike-the-word-nonlawyer-from-its-vocabulary-petition-says-its-time (Apr. 11, 2024). This column uses the term as it is currently found in both the Washington RPCs and the ABA Model Rules.

[4] The term "virtual" is sometimes also used to describe human assistants who operate remotely—often as independent contractors. For this column, we'll limit that term to technology.

[5] RPC 5.1(a) addresses lawyer-managers' duties to ensure that their firms have appropriate systems—such as conflict checking and template engagement agreements—"giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." *See generally Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 at *14 (W.D. Wash. Apr. 22, 2016) (unpublished) (discussing law firm management's role under RPC 5.1(a)). RPC 5.2, in turn, outlines the responsibilities of "subordinate lawyers." *See generally Kasem v. Catholic Health Initiatives*, 334 F.R.D. 315, 320 (W.D. Wash. 2019) (discussing duties under RPC 5.2).

[6] LLLT RPC 5.3 addresses LLLT supervision of nonlawyers and is modeled on the corresponding lawyer rule. RPC 5.10 also governs lawyer supervision of LLLTs.

[7] *See generally* WSBA Advisory Op. 2018 (2003) (corporate context); ABA Formal Op. 467 (2014) (governmental context).

[8] Nonlawyers offering legal advice can also raise issues of unauthorized practice of law. *See* RCW 2.48.180 (unlawful practice of law by nonlawyers); *State v. Yishmael*, 195 Wn.2d 155, 456 P.3d 1172 (2020) (same).

[9] *See generally Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P.3d 1068 (2002) (nonlawyer insurance claims adjuster and his carrier held to standard of care of lawyers in legal malpractice case by policy holders). *See also Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 871, 30 P.3d 8 (2001), *rev'd and remanded on other grounds*, 150 Wn.2d 102, 75 P.3d 497 (2003) ("When a paralegal performs legal services with knowledge that there is no supervising attorney responsible for the case, the paralegal will be held to the attorney's standard of care."). Nonlawyers are generally prohibited from owning law firms under RPC 5.4.

[10] On a related note, the attorney-client privilege generally extends to communications between clients and those acting on behalf of their attorneys—such as nonlawyer assistants. *See generally State v. Aquino-Cervantes*, 88 Wn. App. 699, 707, 945 P.2d 767 (1997); *Greenlake Condominium Association v. Allstate Insurance Co.*, 2015 WL 11921419 at *1 (W.D. Wash. Oct. 30, 2015) (unpublished).

[11] The Washington rule uses the word "assistants" in the title ("Responsibility Regarding Nonlawyer Assistants") while the ABA Model Rule uses the term "assistance" ("Responsibility Regarding Nonlawyer Assistance"). The latter was changed in 2012 to reinforce that the rule applies to both nonlawyer employees of a law firm and nonlawyer independent contractors who are working with the firm. ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (2013) (ABA Legislative History) at 604; *see also* ABA Report 105C to the 2012 House of Delegates (available on the ABA website). Washington has not adopted this semantic change. It is clear from both rules, however, that they are speaking about human nonlawyers.

[12] ABA Legislative History at 602.

[13] *Id.*

[14] *Id.* at 603-04.

[15] *Id.* at 604-06.

[16] *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 879-80 (1986).

[17] See WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 191 (2004) (on file with author) (outlining the parallels to the ABA Model Rule and noting that the recommendation to follow the ABA "was uncontroversial.").

[18] *See* Washington Supreme Court Order 25700-A-1096 (Mar. 23, 2015).

[19] *See* Washington Supreme Court Order 25700-A-1146 (June 2, 2016).

[20] *See also Ali v. American Seafoods Co.*, LLC, 2006 WL 1319449 at *5 (W.D. Wash. May 15, 2006) (unpublished) ("Nonlawyer assistants are also subject to the conflict of interest provisions of the Rules of Professional Conduct.").

[21] ABA, *Profile of Legal Malpractice Claims 2016-2019* (2020) at 22-23.

[22] 163 Wn.2d at 727.

[23] AI's use in law practice and its impact on legal services are currently being studied both nationally and locally—including by the ABA and the WSBA. California and New York—among others—have recently published extensive guidelines discussing the use of AI in law practice. *See* California State Bar, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (2023); New York State Bar Association, *Report and Recommendation of the New York Bar Association Task Force on Artificial Intelligence* (2024).

[24] *See, e.g.,* ABA Formal Op. 498 (2021) at 6; California State Bar Formal Op. Interim No. 2023-208 (2023) at 3; Jan L. Jacobowitz, *Happy Birthday Siri! Dialing in Legal Ethics for Artificial Intelligence, Smartphones, and Real Time Lawyers*, 4 Tex. A&M J. Prop. L. 407, 420-24 (2018).

[25] *See generally* ABA Formal Op. 477R (2017) (electronic communications and data storage); WSBA Advisory Op. 2015 (2012) (cloud computing).

[26] *Mata v. Avianca, Inc.*, 678 F. Supp.3d 443 (S.D.N.Y. 2023).