**California Lawyers Association**

**Ethics Committee**

**Formal Opinion No. 2023-1**

## Nonlawyer Conflicts

*California Rules of Professional Conduct, rule 5.3* [1] *requires a law firm's managerial and supervisory lawyers to make reasonable efforts to ensure their nonlawyers' conduct is compatible with lawyers' professional obligations, including rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties to Former Clients]. Reasonable efforts include determining that nonlawyers understand a lawyer's confidentiality obligations, educating nonlawyers on the firm's procedures for identifying potential or actual conflicts and, where necessary, timely screening nonlawyers to avoid sharing of material confidential information.*

## Discussion

*Overview of the rules related to nonlawyer conflicts of interest*

Lawyers owe duties of confidentiality and loyalty to their current and former clients. (See rule 1.7, comment [1], and rule 1.9, comment [1].) To comply with these duties, a lawyer is prohibited from representing a client in a matter if the lawyer previously represented an adverse party in the same or substantially related matter or currently represents an adverse party in any matter except where the lawyer obtains all affected clients' informed written consent and otherwise complies with the rules.[2] (See rules 1.7 and 1.9.) The lawyer's conflict generally will be imputed to the other lawyers in the firm. (See rule 1.10(a).) Lawyers generally are also prohibited from revealing, or using to their disadvantage, a former or current client's confidential information without informed consent. (See rules 1.6(a), 1.9(c) and 1.8.2.)

The Rules of Professional Conduct, however, apply to lawyers and do not directly regulate the conduct of nonlawyers. (See rule 1.0(a) [providing the "rules are intended to regulate professional conduct *of lawyers* through discipline."] [emphasis added].) The prohibitions on conflicted representations found in rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties to Former Clients] and revealing or adversely using client confidential information thus do not, by their express terms,

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[1] All references to rules are to the California Rules of Professional Conduct.

[2] For example, even if a lawyer could make the necessary disclosures to obtain the informed written consent of all affected clients, a lawyer is prohibited from representing clients adverse to one another in the same litigation or other proceeding before a tribunal. (See rule 1.7(d)(3).)

apply to a firm's nonlawyers, nor does rule 1.10 [Imputation of Conflicts of Interest: General Rule).[3] Indeed, rule 1.10, comment [2], recognizes that the imputation rule "does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary." However, comment [2] also provides that a nonlawyer with a conflict "ordinarily must be screened* from any personal participation in the [prohibited] matter. (See rules 1.0.1(k) and 5.3.)"[4]

In addition to the conflicts rules, rule 5.3 addresses a lawyer's responsibilities regarding nonlawyers working in a firm.[5] A lawyer who has direct supervisory authority over a nonlawyer must "make reasonable efforts to ensure" the nonlawyer's conduct "is compatible with" lawyers' ethical obligations. (See rule 5.3(b).) In addition, lawyers with managerial authority in the firm must "make reasonable efforts to ensure the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with" lawyers' ethical obligations. (See rule 5.3(a).) The duties in rule 5.3 apply to both nonlawyer employees and independent contractors, and cover nonlawyers with differing roles and responsibilities, including legal assistants, paraprofessionals, technical support personnel, and marketing professionals. (See rule 5.3, comment and rule 7.2, comment [3].)

*Lawyers have a duty to address conflicts of interest involving their nonlawyer employees and independent contractors*

If a nonlawyer has information from work at a prior law firm about an adverse party to the current law firm's client, the concern is that the nonlawyer might breach the confidentiality of the prior law firm's client. Even assuming that the

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[3] Paralegals are subject to confidentiality obligations under California Business and Professions Code section 6453. Nonlawyers might also be subject to contractual confidentiality obligations. This opinion does not address such confidentiality obligations nonlawyers might have.

[4] Asterisks associated with terms in the rules and comments identify terms that are defined in rule 1.0.1 (Terminology).

[5] Rule 1.0.1(c) defines law firm to mean "a law partnership; a professional law corporation; *a lawyer acting as a sole proprietorship*; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization." (Emphasis added.) We emphasize that a "firm" includes a solo practice to alert solo practitioners that the duties imposed by rule 5.3 apply to them, just as they do to a large firm with many lawyers.

nonlawyer's current law firm[6] does not owe any duties of loyalty or confidentiality to the adverse party with respect to its confidential information by virtue of a former or concurrent relationship, rule 1.10, comment [2], and lawyers' broad ethical duties support the notion that a lawyer's duties under rule 5.3 include avoiding the acquisition of confidential information of an adverse party from nonlawyers. First, under rule 8.4(d), a lawyer must not "engage in conduct that is prejudicial to the administration of justice." State Bar Formal Opinion No. 2013-189, which looked at a lawyer's dealings with opposing counsel, recognized that attorneys have a duty to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice (citing to *Kirsch v. Duryea* (1978) 21 Cal.3d 303, 309). Second, if a nonlawyer were to share an adverse party's confidential information with a current law firm employer, the law firm more likely than not would be prohibited from representing its client.[7] A competent lawyer would make reasonable efforts to avoid such a result, and the lawyer's failure to do so would likely violate rules 1.1 and 5.3.[8]

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[6] "Law Firm" or "firm" is sometimes used in this opinion as shorthand in reference to the responsibilities of Law Firm's managerial and supervisory lawyers. It is the individual lawyers in a firm who owe duties to a client; the Rules of Professional Conduct regulate the conduct of lawyers, rather than law firms, through professional discipline. (See rule 1.0(a).)

[7] See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572 (where court disqualified law firm because there was a reasonable inference a paralegal had shared confidential information learned at a prior firm); see also Rest.3d The Law Governing Lawyers, § 123, com. f ("If a nonlawyer employee in fact conveys confidential information learned about a client in one firm to lawyers in another, a prohibition on representation by the second firm would be warranted").

[8] Although not directly on point, we note that other rules similarly protect the integrity of confidential communications of a third person. For example, one of the rationales underlying rule 4.2, prohibiting communications with a represented person, is to protect the confidentiality of communications between the represented person and that person's lawyer. (See Exec. Summary for Proposed Rule 4.2, State Bar of California Commission for the Revision of the Rules of Professional Conduct; see also rule 4.4 [which addresses a lawyer's duties concerning inadvertently transmitted writings that the receiving lawyer knows or reasonably should know are privileged or subject to work product protection], and rule 4.3(b) [which provides a lawyer must not seek to obtain privileged or other confidential information which the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not entitled to receive].)

*The duty to address nonlawyer conflicts of interest requires a lawyer to use reasonable efforts to reasonably assure the firm's nonlawyer conduct is compatible with the lawyer's duties.*

Rule 5.3(a), together with rule 5.1(a), requires managerial lawyers to use reasonable efforts to ensure the firm has in place measures that will guide others in the firm – both lawyers and nonlawyers – in their professional conduct.[9] The measures are intended to provide assurance that the conduct of nonlawyers is compatible with the lawyer's professional obligations. Further, the comment to rule 5.3 notes that the "measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training."[10] Because a nonlawyer might not understand what information is confidential or what constitutes a conflict of interest, under rule 5.3, managerial lawyers need to have in place measures that facilitate the identification of nonlawyer conflicts. See below for possible measures. If managerial lawyers delegate instruction or supervision of nonlawyers, the question is whether the measures implemented, including the delegation, are reasonable. Although the rules do not define "reasonable efforts," the term "reasonable" is defined in rule 1.0.1(h) to mean, when used in reference to a lawyer's conduct, "the conduct of a reasonably prudent and competent lawyer." For example, whether a lawyer might reasonably delegate training of nonlawyers to a nonlawyer would depend on whether the nonlawyer trainer has sufficient experience in the subject of the training, as well as a firm understanding of lawyers' ethical obligations.

A lawyer who has direct supervisory authority over a nonlawyer must make reasonable efforts to ensure the nonlawyer's conduct is compatible with the lawyer's professional obligations. A supervisory lawyer may rely on measures adopted by a law firm's managerial lawyers, assuming those measures are reasonable, but has a separate duty to oversee the nonlawyer's conduct.

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[9] See rule 5.1, comment [1].

[10] This guidance corresponds to the instruction in Model Rule 5.3, comment [3], which states that the "extent of this obligation [to make reasonable efforts] 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 with regard to confidentiality." (See also Rest.3d The Law Governing Lawyers, § 11, com. c [recognizing that measures a supervising lawyer takes must take into account that a nonlawyer employee may not yet have received adequate preparation for carrying out that person's responsibilities].)

Based on our understanding of rule 5.3's requirement that managerial and supervisory lawyers make reasonable efforts to ensure the compatibility of nonlawyers' conduct with their professional obligations, we believe the following are measures, preferably in tandem with one another, that a lawyer can take to address the lawyer's rule 5.3 duties regarding conflicts of interest:

(i) A lawyer needs to reasonably inquire into the nonlawyer's prior and/or concurrent employment.

This should be part of the hiring process when hiring full-time or part-time nonlawyer staff.[11] For nonlawyer contractors who might work with many law firms and companies, such as IT service providers or bookkeepers, this means inquiring into how a contractor avoids disclosure of confidential information. In appropriate circumstances, the lawyer may want to require that the outside contractor enter into a non-disclosure agreement.[12]

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[11] See L.A. County Bar Assn. Formal Opn. 524 (May 16, 2011), which expresses that a law firm must conduct a reasonable inquiry into potential conflicts when hiring nonlawyer staff, but the "inquiry should not seek to delve into the substance of the information or confidences the prospective employee may have acquired, as the very act of doing so may trigger the divulging of confidential information." In most situations, the identity of the client would not be confidential information. (See State Bar Formal Opn. 2011-182, p. 4.)

[12] See State Bar Formal Opn. 2010-179 [suggesting that, if a third party has access to client confidential information through a software license, the lawyer may need to confirm that the third party is restricted from disclosing this information; if a lawyer does not possess the capability to evaluate technology, the lawyer must seek additional information or consult with someone capable of making the evaluation]; ABA Formal Ethics Opn. 477R (rev. May 22, 2017) [lawyer must monitor the vendor's performance, meaning that the lawyer should remain aware of how the services are being performed]; ABA Formal Ethics Opn. 95-398 (Oct. 27, 1995) [opining that a lawyer who hires an outside technology vendor must ensure the vendor has reasonable procedures to protect confidentiality, which could include a written statement of the vendor's assurance of confidentiality]; San Diego County Bar Assn. Ethics Opinion No. 2012-1 [lawyer hiring third party e-discovery vendor must be "involved in the engagement process to ensure that the vendor understands its confidentiality obligations, has the requisite training, understands its duty to scrutinize its work and its obligations in handling confidential information inadvertently produced by other parties."].)

(ii) A lawyer needs to either train a nonlawyer on lawyers' confidentiality obligations or confirm that the nonlawyer has received prior training and is knowledgeable about these obligations.

The intent of the training would be to assist lawyers in identifying nonlawyer conflicts of interest. The level of training might vary depending on the nonlawyers' level of experience, access to information, and prior legal training.[13] Training might not be necessary if the firm learns that the nonlawyer previously received training through an educational program or through another firm. It also might not be necessary if the firm learns that a service provider is experienced in providing services to lawyers. Whether the firm should go beyond asking the nonlawyer to confirm appropriate training or experience will depend on the particular circumstances. For example, the firm might confirm through an interview that a paralegal with extensive experience understands the lawyers' professional obligations, but might provide written materials and particularized training to a newly-minted legal assistant.

(iii) A lawyer needs to direct the nonlawyer not to share confidential information the nonlawyer might have obtained at another firm and to notify the firm if any firm matter is one in which the nonlawyer might have worked on behalf of another firm.

Although a firm might collect information from a nonlawyer at the hiring stage to determine whether any conflicts exist at that time, it is possible a conflict might later arise, for example, where the firm has taken on a new client or engages in a new matter for an existing client. The firm, during the training of its nonlawyer hires, would need to inform the nonlawyer of the firm's procedure if the nonlawyer is familiar with a firm's client or matter from other work. The firm would also want to provide the nonlawyer with information on how to proceed should the nonlawyer become aware of a conflict, e.g., whom should the nonlawyer inform so that reasonable steps may be taken to protect the firm's relationship with its client.

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[13] It might also depend on the size of the firm. (See Rest.3d The Law Governing Lawyers, § 11, com. g ["Policies and practices of a solo practitioner with a single experienced nonlawyer assistant may be entirely informal, but the policies and practices for a much larger firm with many lawyers and nonlawyer employees must be correspondingly more encompassing. In carrying out those responsibilities, many law firms' policies provide for continuing professional education for both lawyers and nonlawyers."].)

> A supervisory lawyer needs to be aware and sensitive to the fact that a nonlawyer's conflict of interest might arise any time and must inquire further if a nonlawyer mentions familiarity with a client or matter.

If the lawyer learns that the nonlawyer possesses confidential information material to the current matter, the law firm likely will need to timely implement screening measures. In *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, the court upheld the disqualification of a firm because it employed a paralegal who had learned confidential information about the case while at his previous employer, and stated "disqualification is required not because of an attorney's affirmative misconduct, but because errors of omission and insensitivity to ethical dictates allowed the employee's misconduct to taint the firm with a violation of attorney-client confidentiality." (See also rule 1.10, comment [2] [although rule 1.10 does not prohibit representation by firm lawyers where the prohibited person is a nonlawyer, the nonlawyer "ordinarily must be screened from any personal participation in the matter."].)[14]

Opinions in other jurisdictions are in accord with the foregoing analysis.[15]

## CONCLUSION

Although the prohibitions of conflicts in rules 1.7 and 1.9 and the imputation of conflicts within a firm do not directly apply to nonlawyers, a lawyer has a duty to address nonlawyer conflicts of interest. The duty under rule 5.3 to supervise nonlawyers includes avoiding the possibility that a nonlawyer will share with firm lawyers confidential information of an adversary. Lawyers must use reasonable efforts to train nonlawyers about lawyer's duties or confirm that nonlawyers understand these duties, educate nonlawyers on the firm's procedures to allow the firm's managerial and supervisory lawyers to identify potential or

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[14] The comment does not explain when screening is not required and uses the word "ordinarily" to describe when screening is needed. We believe screening should be done when the firm determines the nonlawyer might have material confidential information of an adverse party. For more about screening, see California Lawyers Association Ethics Committee, Formal Opinion No. 2021-1.

[15] See, e.g., New York State Bar Association Formal Opinion 905 (2012) (supervisory duties when hiring a lawyer who previously worked at another firm as a paralegal); New York State Bar Association Formal Opinion (supervisory duties when hiring a secretary, paralegal or other nonlawyer who previously worked at another firm); Pennsylvania Bar Association Formal Opinion 98-75 (supervisory duties regarding nonlawyers).

actual conflicts, and timely screen nonlawyers when necessary to avoid sharing of confidential information.

**Caveat:** In accordance with California Rules of Professional Conduct, rule 1.0, comment [4], opinions of ethics committees in California are not binding, but should be consulted for guidance on proper professional conduct.

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