

Rule 1.1 [3-110] Competence
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this Rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See Rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

**Proposed Rule 1.1 [3-110] Competence
Synopsis of Public Comments**

TOTAL = 7	A = 4
	D = 1
	M = 2
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32b	Law Professors (Zitrin) (07-25-16)	Yes	A		We are gratified to see the inclusion of a separate rule on diligence along with a definition of diligence. Moreover, the commission has corrected the overly narrow standard required for a violation of MR 1.1 by adding the phrase “gross negligence” to the rule itself and eliminating the comment to MR 1.1 regarding “a single act of negligent conduct...”	No response required.
X-2016-43d	Committee on Professional Responsibility and Conduct (Baldwin) (08-12-16)	Yes	A		COPRAC supports the revised Rule as proposed	No response required.
X-2016-52b	Law Professors (Zitrin) (08-24-16)	Yes	A		See X-2016-32b Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32b for the Commission’s response to the Law Professors’ comments.
X-2016-68b	Law Professors (Zitrin) (09-21-16)	Yes	A		See X-2016-32b Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32b for the Commission’s response to the Law Professors’ comments.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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Synopsis of Public Comments**

TOTAL = 7 **A = 4**
D = 1
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Public Hearing	Castaneda, Jose (Provided oral public hearing testimony on July 26, 2016. See pages 81-82 of the public hearing transcript.)	Uncertain			The Castaneda comments at the public hearing related personal experiences and were not directed to the content of the proposed rule	No response required.
X-2016-104c	OCTC	Yes	M		<p>1. OCTC supports adding gross negligence to this rule because that is consistent with case law.</p> <p>2. OCTC is concerned with the proposals to separate competence, diligence, and supervision into separate rules. Current rule 3-110 works well, is well understood, and enforceable. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Further, there is well-established case law concerning the current rule.</p> <p>3. A failure to perform diligently is a failure to perform competently, because diligence is an essential part of competence. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping.</p>	<p>1. No response required.</p> <p>2 – 5. The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).</p>

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					<p>Choosing the wrong rule to charge will result in a dismissal even though respondent was on notice as to what the charge was about. For instance, if an attorney does not know or learn the time lines for filing pleadings in a case and, thus, does not perform them in a timely manner, is that a failure to perform diligently or a failure to perform competently? At the very least, it will cause an unnecessary proliferation of the charges filed against attorneys and make enforcement more difficult.</p> <p>4. Segregating supervision from competence is even more difficult, confusing, and artificial than separating diligence and competence. It will make proper charging of respondents more difficult. Supervision by an attorney is a part of lawyer competence. (See <i>In the Matter of Valinoti</i> (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 522, fn. 29 [respondent's development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3–110(A)), to</p>	

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					<p>adequately communicate with his clients (rule 3–500; § 6068, subd. (m)), to protect his clients' confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule 4–100)]; <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117, 123 [An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority]; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847; <i>Bernstein v. State Bar</i> (1990) 50 Cal.3d 221; <i>Gadda v. State Bar</i> (1990) 50 Cal.3d 344, 353-354; <i>In the Matter of Blum</i> (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403.)</p> <p>5. Also, distinguishing between competence or diligence and failing to supervise is not easy. The concepts and lines are often blurry, unclear, and overlapping. Choosing the wrong rule to charge will result in a dismissal, even though respondent was on notice as to the basis of the charge. For instance, many attorneys dispute allegations, but never contend that the misconduct occurred because of a lack of supervision until they are testifying at trial, long after</p>	

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					<p>the charges have been brought. If the court determines that the misconduct was the result of a failure to supervise, which was not alleged, the respondent could escape culpability for a failure to perform competently or diligently. (See e.g. <i>In the Matter of Bolanos</i>, Case No. 15-O-10896 [dismissing failure to communicate allegation, although conduct could have been classified as a competence issue].)</p> <p>6.OCTC is concerned about Comments 1 and 2. Those Comments are not necessary or correct, even if the concepts of competence, diligence, and supervision are separated. The Comments are unnecessary because each rule already explains what it governs. Further, as discussed, supervision of an attorney's employees, office, and case is an essential part of lawyer competence and cannot be separated from competence.</p>	<p>6. The Commission believes it is important to retain Comments [1] and [2], which provide cross-references to the supervision rules [5.1 to 5.3] and the diligence rule [1.3], respectively. It is important to provide those references because those concepts had both previously been found within the competence rule.</p>
X-2016-76b	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los	Yes	M		PREC notes that subpart (a) of Proposed Rule 1.1 [Competence (current Rule 3-110)] adds the term “with gross negligence” to the list of conduct in which a	Rules 1.1 and 1.3 have been drafted to more clearly identify the fact that “gross negligence” is an existing basis for discipline.

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	Angeles (PREC) (Schmid) (09-24-16)				<p>lawyer may not engage if his or her obligation to perform legal services with competence is to be met. PREC believes that discipline relating to a lawyer's failure to practice in a competent manner should be limited in this rule to conduct that is repeated, intentional, or reckless, as in currently Rule 3-110. PREC is concerned that including gross negligence among the conduct supporting a finding of a lack of competence creates a significant risk that a lawyer who is found to have acted with gross negligence, and therefore not competently, will also be found to have engaged in an act of moral turpitude.</p> <p>Cases dealing with lawyer competence typically do not involve the habitual disregard of client interests and therefore could not support a finding of moral turpitude. Nevertheless, if gross negligence is incorporated into the lawyer competency rule, PREC believes this will result not only in charges regarding a lawyer's competence, but also in additional, unnecessary charges of moral turpitude. Such a result is inconsistent with the definition of "competence" set forth in subpart (b) of Proposed Rule 1.1,</p>	

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					which does not include acts of moral turpitude. Moreover, because charges are posted on the State Bar website as soon as they are filed (although there is a disclaimer that they are allegations only), those charged with competence issues could be prejudiced by allegations that they engaged in an act of moral turpitude even though the facts underlying the competency charge do not involve a habitual disregard of client interests. Furthermore, even if a competency case does demonstrate a habitual disregard of client interests, and therefore involves moral turpitude, it would be duplicative to charge an attorney with a violation of Proposed Rule 1.1, given that the lawyer could be charged with a violation of Business and Professions Code section 6106, which would support greater discipline.	
X-2016-76I	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	D		<u>Supplemental comment.</u> 1. As Proposed Rule 1.1 [Competence] defines competence to include diligence, PREC believes Proposed Rule 1.3 [Diligence] is unnecessary and inappropriate.	1. Rule 1.1 does not define competence to include diligence.

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					2. Unlike Proposed Rule 1.1, a violation of Proposed Rule 1.3 does not necessarily implicate the duty of loyalty or require harm or the potential for harm to the client. PREC recommends that the definition of "reasonable diligence" in subpart (b) of Proposed Rule 1.3 be moved to Proposed Rule 1.1, and the term "diligence" in Proposed Rule 1.1 be modified to be "reasonable diligence."	2. The Commission has not made the suggested change. The decision to separate diligence and competence and supervision into separate rules to enhance compliance and conform to the national standard remains valid. Most of the comments the Commission has received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).
X-2016-75a	Steven Kerins	No	M		<p>1. The existing "competence bases" for imposing discipline are more than adequate for public protection, and gross negligence should not be added to intentional, reckless, or repeated conduct as a basis for possible discipline.</p> <p>2. A comment should be added to address "competence creep", or the effect of specialization on the legal profession. It should be clarified that generalists' learning and skill will be judged against that of other generalists - a matter of particular significance to attorneys practicing in rural areas, and presumably, to their</p>	<p>Rules 1.1 and 1.3 have been drafted to more clearly identify the fact that "gross negligence" is an existing basis for discipline.</p> <p>2. The Commission has not made the suggested change. The Commission is not aware of any effort to discipline lawyers based on the level of skill of a specialist or expert, although it believes that would be proper for a lawyer who claims to be an expert.</p>

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					clients.	
X-2016-66a	San Diego County Bar Assoc.	Yes	A		We commend and support the Commission's choice of a separate rule that establishes an ethical duty of diligence, removing it from the Comment in the current competence rule, Rule 3-110, and also providing a definition of "reasonable diligence" for purposes of discipline. While the concepts of competence and diligence are linked, we believe they are sufficiently different, particularly from a client's perspective, that they warrant separate treatment. A lawyer may be technically competent—i.e., have the requisite skill—but still not pay adequate attention to, or even grossly neglect obligations to, a client. This addition of proposed Rule 1.3 makes clear that a lawyer has the ethical obligation both to be competent and to act with commitment and dedication to the interests of the client. We also support the inclusion of "gross negligence" into the scope of both the competence and the diligence rule.	No response required.

Rule 1.4.1 [3-510] Communication of Settlement Offers
(Commission's Proposed Rule Adopted on August 14, 2015 – Clean Version)

- (a) A lawyer shall promptly communicate to the lawyer's client:
 - (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
 - (2) All amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.
- (b) As used in this Rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under Rule 1.4.

Note: [*] indicates that a reference to a specific subparagraph will be included after the referenced rule has been completed by the Commission.

Proposed Rule 1.4.1 [3-510] Communication of Settlement Offers
Synopsis of Public Comments

TOTAL = XX **A = 2**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43h	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	A	1.4.1	Supports adoption of proposed rule 1.4.1	No response required.
X-2016-76d	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	(a), (b)	The rule should be amended to clarify that the lawyer can meet her duty by communicating settlement offers and pleas to any authorized representative of the client.	The Commission declines to make the suggested change. The Commission has recommended that current rule 3-510(B) be carried forward as proposed rule 1.4.1(b). The Commission is not aware that the current requirement has caused any problems. On the contrary, the suggested substitute language, “any duly authorized representative,” begs the question, “authorized to do what?” That language is vague and ambiguous and could be used to justify a lawyer’s failure to ensure the appropriate decision maker has been satisfied.
X-2016-82a	Polish, James (9-26-16)	N	M		Lawyers should be required to communicate all settlement offers, not just written ones.	The Commission declines to make the suggested change. Under the rule, every written offer of settlement must be communicated as well as any oral offer that constitutes a “significant development” in the representation. (See

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

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NI = NOT INDICATED

**Proposed Rule 1.4.1 [3-510] Communication of Settlement Offers
Synopsis of Public Comments**

TOTAL = XX **A = 2**
 D = 0
 M = 2
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						proposed Rule 1.4(a)(3).) The Commission sees no reason to require oral offers that do not satisfy that standard to be communicated.
X-2016-104h	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	A	1.4.1	Supports adoption of proposed rule 1.4.1	No response required.

Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

- (a) A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
 - (1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
 - (2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;
 - (3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;
 - (4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

Comment

[1] The disclosure obligation imposed by Paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written* fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

“Pursuant to California Rule of Professional Conduct 1.4.2, I am informing you in writing that I no longer have professional liability insurance.”

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know whether the lawyer is or is not covered by professional liability insurance.

**Proposed Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance
Synopsis of Public Comments**

TOTAL = XX	A = 1
	D = 0
	M = 0
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-104i	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		<p>1. OCTC supports this rule.</p> <p>2. OCTC supports Comments 1 and 4.</p> <p>3. OCTC is concerned that Comments 2 and 3 do not explain or interpret the rule, but simply provide legal advice to attorneys.</p>	<p>1. No response required.</p> <p>2. No response required.</p> <p>3. The Commission has retained Comments [2] and [3]. The Supreme Court approved this rule relatively recently, operative January 1, 2010. The Commission believes the comments provide important interpretative guidance on the rule's application. The Commission is also not aware of any problems that have arisen with respect to enforcing the rule because of Comments [2] and [3].</p>

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**Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)**

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with Rules 1.7(b) and 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter;
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client; and
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

**Proposed Rule 1.8.5 [4-210] Payment of Personal or Business Expenses
Incurred by or for a Client
Synopsis of Public Comments**

**TOTAL = 4 A = 4
D = 0
M = 0
NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43o	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-17-16)	Yes	A	1.8.5	Supports the adoption of proposed Rule 1.8.5.	No response required.
X-2016-104q	Office of Chief Trial Counsel (OCTC) (Dressor) (09-27-16)	Yes	A	1.8.5	Supports the adoption of proposed Rule 1.8.5.	No response required.
X-2016-120f	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.5	Supports the adoption of proposed Rule 1.8.5.	No response required.
X-2016-121d	California Commission on Access to Justice (CCAJ) (Hartston) (10-03-16)	Yes	A	1.8.5	CCAJ supports the exemption in proposed Rule 1.8.5 to allow lawyers to pay costs or expenses to promote the interests of an indigent or pro bono client in a matter in which the lawyer represents the client. Such monetary assistance to indigent clients can make a material difference in a client's ability to arrive timely and prepared at a hearing.	No response required.

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Rule 1.8.6 [3-310(F)] Compensation From One Other Than Client
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;
- (b) information is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6; and
- (c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:
 - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or
 - (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been

identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client
Synopsis of Public Comments

TOTAL = 4 **A = 2**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ay	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	M		COPRAC supports the proposed rule but recommends that the first sentence be rewritten. The sentence as presently drafted reads: "A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:" This language seems awkward and appears to have a misplaced prepositional phrase. The statement "from one other than the client" looks like it should modify "enter into an agreement for, charge, or accept compensation from" and not "representing a client." We suggest revising the first sentence to read: "A lawyer shall not enter into an agreement for, charge, or accept compensation from one other than a client for representing that client unless:"	The Commission has not made the suggested change. The Commission believes the requested language is implicit in the rule. In any event, the language is verbatim from current rule 3-310(F) and the Commission is not aware that it has caused any problems.
X-2016-82b	Polish, James (09-26-16)	No	M		1. I do not believe that this rule should apply to a situation where the client has applied for insurance or has otherwise requested and is receiving payments under an indemnity agreement.	1. The Commission has not made any changes to the rule or comment. It believes that Comment [3] adequately addresses the issue.

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Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client
Synopsis of Public Comments

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 D = 0
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					2. Also, the comment should be clarified to specify whether the rule applies where one of multiple clients in a matter pays the legal expenses of the others, a very common situation.	2. The Commission does not believe such a comment is necessary. The rule applies to any situation in which a third party is compensating the lawyer for representing a client. The situation the commenter identifies clearly falls within the rule.
X-2016-104r	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		1. OCTC supports this rule and its Comments. 2. OCTC believes, however, that a Comment should be added requiring lawyers to advise both the client and the paying non-client in writing that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client, and, even with such designation, the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to OCTC because they do not understand that the lawyer cannot communicate with them.	1. No response required. 2. The Commission did not make the suggested change. The suggested addition would exceed the scope of the rule and add practice requirements that should not be in the Rules.

**Proposed Rule 1.8.6 [3-310(F)] Compensation from One Other Than Client
Synopsis of Public Comments**

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D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response A = 12 NI = 0
X-2016-120g	LGBT Bar Association of Los Angeles (LGBT Bar of LA) (King) (09-27-16)	Yes	A		LGBT Bar of LA supports the proposed revisions to 1.8.6	No response required.

Rule 1.8.8 [3-400] Limiting Liability to Client
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
 - (1) represented by an independent lawyer concerning the settlement; or
 - (2) advised in writing* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable* opportunity to seek that advice.

Comment

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably* limiting the scope of the lawyer's representation. See Rule 1.2(b).

Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client
Synopsis of Public Comments

TOTAL = 4 **A = 2**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-14	Greene Radovsky Maloney Share & Hennigh LLP (Fotenos) (07-29-16)	Yes	M	1.8.8	Modify the proposed rule to conform to ABA Model Rule 1.8(h)(1) that permits lawyers to limit their prospective liability to a client for malpractice when a client is independently represented in making the agreement.	The Commission believes that proposed rule 1.8.8 should not be changed to conform to Mode Rule 1.8(h)(1). In considering proposed California Rule 1.8.8 vs. ABA Model Rule 1.8(h)(1), the Commission deemed California's long standing absolute prohibition of prospective limitation of malpractice liability as better policy and more client protective. The ABA Model Rule would permit a lawyer to contract with a client to prospectively limit malpractice liability where the client is independently represented in making the agreement. The ABA provision purportedly is intended to permit sophisticated clients to prospectively waive a lawyer or law firm's liability in cases involving areas where the law is poorly developed and there is a significant risk that liability might be imposed in hindsight. The Commission believes such situations are rare, but the risk that such a provision might be used with clients not

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client
Synopsis of Public Comments

TOTAL = 4 **A = 2**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						experienced in the use of legal services is great. Additionally, Comment 2 provides appropriate guidance noting that "This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2(b)."
X-2016-43p	COPRAC (Baldwin) (8/12/16)	Y	A	1.8.1	Supports adoption of proposed Rule 1.8.8.	No response required.
X-2016-104t	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	M		<p>1. OCTC supports this rule. OCTC would recommend, however, that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's Model Rule limiting liability because that rule does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering," 3rd Edition, § 12.19.)</p> <p>2. OCTC supports Comment 1.</p>	<p>1. The Commission did not make the requested change. The Commission determined the protection of the client's interest to be appropriately addressed by the inclusion in the Rule of independent counsel requirements. That is what the current rule applies and the Commission is not aware of any problems that warrant a change to the rule.</p> <p>2. No response required.</p>

Proposed Rule 1.8.8 [3-400] Limiting Liability to a Client
Synopsis of Public Comments

TOTAL = 4 **A = 2**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					3. OCTC finds the first part of Comment 2 to be vague. It does not understand what the Comment means by “customary qualifications and limitations.” This needs to be either explained or the Comment should be stricken. Without an explanation or definition of what the Comment is referring to, this rule will be difficult to understand or enforce, or will end up covering something not intended to be covered. It is not necessary to have a Comment that states the rule does not prevent a lawyer from reasonably limiting the scope of the representation. This rule on its face does not address that issue and limiting the scope of representation does not limit liability.	3. The Commission did not make a change to Comment [2]. The questioned language of comment [2] comes directly from the Discussion to current rule 3-400. The Commission is not aware of any confusion or problems in enforcement caused by that language.
X-2016-120i	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A		Supports adoption of proposed Rule 1.8.8.	No response required.

**Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure
or a Sale Subject to Judicial Review**

(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm* or is an employee of the lawyer or the lawyer's law firm.*

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a
Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments**

TOTAL = 3 **A = 2**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ba	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-2016)	N	M	1.8.9	Proposed Rule 1.8.9 directly conflicts with certain Probate Code sections 9881 and 9882, which expressly permit the purchases by a lawyer that the proposed rule prohibits. Such a direct conflict between statutory law and ethical rules is confusing and a trap for the unwary, and implies that the laws passed by our legislature expressly authorized conduct that is unethical. COPRAC supports the approach proposed by the first Rules Revision Commission ("RRC1") in its proposed Rule 1.8.9, which exempted any transaction permitted by the Probate Code, as long as the transaction did not violate any other ethical rule. ²	The Commission disagrees that a rule excepting sales pursuant to Probate Code §§ 9881 and 9882 should be substituted for the Commission's proposed rule. There are several reasons for the Commission's recommended rule: <i>First</i> , when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code.

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² RRC1's proposed Rule 1.8.9 provided:

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a
Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments**

TOTAL = 3 **A = 2**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					The public is not protected by an inflexible rule that prohibits transactions that a court has determined to be to the advantage of the estate and which are fair, reasonable and subject to independent advice (as required by Rule 1.8.1).	Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. <i>Second</i> , Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct. Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. <i>Third</i> , the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a
Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments**

TOTAL = 3
A = 2
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						<p>under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. <i>Lastly</i>, the Office of the Chief Trial Counsel on three separate occasions submitted a comment urging the first Commission or this Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections.</p> <p>The commenter's last point is that the court will confirm the lawyer's compliance with proposed Rule 1.8.1 [current rule 3-300] and its requirement to provide to the client [estate] an opportunity to seek independent advice and will result in public protection. However, Probate Code § 9881, the statute under which a lawyer would seek to have a court approve the sale, requires only "written consent" and does not require that the court determine that the transaction or acquisition is fair and reasonable to the estate</p>

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a
Foreclosure or a Sale Subject to Judicial Review
Synopsis of Public Comments**

TOTAL = 3 **A = 2**
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						or beneficiaries and that the terms are fully disclosed in writing with an opportunity to seek the advice of independent counsel. RRC1's approach would not enhance public protection.
X-2016-104u	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A	1.8.9	Supports adoption of the proposed Rule 1.8.9.	No response required.
X-2016-120j	LGBT Bar Association of Los Angeles (King) (10-03-16)	Yes	A	1.8.9	Supports adoption of the proposed Rule 1.8.9.	No response required.

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

While lawyers are associated in a law firm,* a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
Synopsis of Public Comments

TOTAL = 4 **A = 2**
D = 1
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bb	Committee on Professional Responsibility and Conduct (COPRAC) (09-08-16)	Y	A		COPRAC has reviewed the provisions of proposed Rule 1.8.11 – Imputation of Prohibitions. COPRAC generally supports the adoption of Rule 1.8.11. However, to avoid possible ambiguity about the impact of this Rule, COPRAC suggests that the Commission add a comment stating that no attorney will be subject to discipline for a violation of Rules 1.8.1 – 1.8.9 committed by another attorney merely because they are both members of the same law firm, that is, without participation in the misconduct that constitutes the violation.	The Commission did not make the suggested change. Neither the rule nor the comment suggests that <i>liability</i> for a violation by another lawyer in a firm will be imputed to any other lawyer simply by the other lawyer being a partner or associate in the firm. The plain language of the rule only imputes the <i>prohibition</i> on engaging in the conduct, not liability should another firm lawyer engages in the conduct.
X-2016-82g	Polish, James (09-27-16)	N	M		This rule imputes one lawyer's disqualification to all lawyers in the law firm in nearly all cases, including where one lawyer happens to have a personal interest. The corresponding ABA Model Rule (no. 1.10(a)) does not require disqualification if the personal interest of the disqualified lawyer does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. That is a prudent limitation that	The commenter is mistaken. This provision is not the counterpart to Model Rule 1.10(a), but rather is the counterpart of Model Rule 1.8(k). The proposed rule is a nearly verbatim statement of the Model Rule.

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Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
Synopsis of Public Comments

TOTAL = 4 **A = 2**
 D = 1
 M = 1
 NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					should be adopted. I may have a personal interest in the subject matter of a representation because my political, religious, environmental or other personal views are strongly opposed to the relief a client of the firm is seeking or a position it is taking in a matter. That should not have any influence on the ability of another lawyer in the firm to represent the client effectively.	
X-2016-75c	Kerins, Steve (09-25-16)	N	D		In my opinion, the proposed rule is too stringent for the realities of a modern law practice, and is particularly onerous in contexts where lawyers move from one firm or employer to another.	The rule is not onerous. It simply clarifies that certain situations that involve a conflict between a lawyer and a client cannot be resolved by the client's consent to allow another lawyer in the lawyer's firm handle the matter.
X-2016-104w	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	A		1. Supports adoption of proposed Rule 1.8.11. 2. Comment should be stricken except for the last sentence. The remainder of the comment restates the rule.	1. No response required. 2. The Commission did not make the suggested. It believes that the first and second sentences provide an important example that explains the application of the rule, which is a proper function of a comment.