

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.3**

### **Commission Drafting Team Information**

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### **I. CURRENT ABA MODEL RULE**

**[There is no California Rule that corresponds to Model Rule 1.3,  
from which proposed Rule 1.3 is derived.]**

#### **Rule 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### **Comment**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing

basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.3

Vote: 13 (yes) – 1 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.3

Vote: X (yes) – X (no) – X (abstain)

## **III. COMMISSION'S PROPOSED RULE (CLEAN)**

### **Rule 1.3 Diligence**

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable\* diligence in representing a client.
- (b) For purposes of this Rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

## Comment

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

[2] See Rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

## IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.3)

### Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable\* diligence ~~and promptness~~ in representing a client.

(b) For purposes of this Rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

## Comment

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

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## **V. RULE HISTORY**

### **A. History of Rule 3-110 Failing to Act Competently**

Current rule 3-110 originated in 1975 with former rule 6-101, which prohibited a lawyer from "willfully or habitually"<sup>1</sup> performing legal services "if the lawyer knows or reasonably should know" that the lawyer "does not possess the learning and skill ordinarily possessed by lawyers" who perform "similar services" in the "same or similar locality." (Rule 6-101(1)).

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<sup>1</sup> The "habitual" standard was derived from California case law which, at the time former rule 6-101 was adopted, was the primary California authority providing for discipline of incompetent members of the State Bar. See *Ridley v. State Bar* (1972) 6 Cal.3d 551, 560 [99 Cal.Rptr. 873]; *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [87 Cal.Rptr. 368]; *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-84 [58 Cal.Rptr. 564].

In a separate paragraph (2), former rule 6-101 also prohibited a lawyer from failing to “use reasonable diligence and his best judgment” in exercising his skill and learning “to accomplish, with reasonable speed, the purpose for which he was employed.”

Rule 6-101 was amended in 1983 to state that a lawyer “shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently.” The operative term “willfully” was replaced by “intentionally or with reckless disregard” to address concern that “willfully” is confused with the concept of a “willful breach” of the Rules under Business and Professions Code § 6077. The substitution avoided that confusion but preserved the meaning of the original language. (See Bates stamp page 00008 of “Memorandum In Support Of Request That Proposed Amendments To Rule 6-101, Rules Of Professional Conduct Of The State Bar Of California Be Approved By The Supreme Court Of California And Supporting Documents,” August 11, 1983 (“1983 Memorandum”).)

Another amendment in 1983 substituted “repeatedly” for “habitually.” The word “repeatedly” was regarded as a more accurate description of the intended disciplinary standard.

The 1983 amendments also added a definition of competence. Rule 6-101(A)(1) provided that: “Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member’s duties arising from the employment or representation.” The language of the definition was intended to accomplish two objectives: (1) incorporate the concept of “diligence” into the definition; and (2) emphasize that competence means the lawyer’s application and performance of skill and knowledge, and does not merely reflect that the lawyer possesses those qualities. On the latter point, the 1983 Memorandum states:

“The rule’s definition of competence focuses upon whether or not the lawyer has performed legal services on behalf of the client competently rather than upon innate or inherent abilities, skills or qualities. The rule provides for an examination of an attorney’s conduct and actions, rather than an attorney’s intent, in the performance of legal services.” (See page 4 of the 1983 Memorandum.)

In 1989, former rule 6-101 was renumbered 3-110 as part of a comprehensive revision and renumbering of the entire rules. Rule 3-110 did not entail any major substantive revisions. (See page 31 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

Rule 3-110 was last amended in 1992. (See page 13 of Supreme Court File No. 24408, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991.) No substantive changes were made to paragraph (A) but the provision was stated more succinctly as: “A member

shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

In paragraph (B), the phrase “to perform legal services competently” in the definition was reduced to a single word, “competence.” Also, the term “ability,” defined in the 1987 version of rule 3-110(C), was merged into the definition of competence.

## **B. ABA Model Rule 1.3 Diligence**

The ABA Model Rules devote a separate rule to the concept of diligence. Model Rule 1.3 provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **Comment**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that

the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Neither the Commission in 1989-1992, nor the first Commission in 2010, recommended adopting Model Rule 1.3 because it took the position that diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence. Both current California Rule 3-110 and the first Commission's proposed Rule 1.1 define competence to include diligence as a key factor in assessing a lawyer's performance of legal services. The first Commission's proposed Rule 1.1, in part, provided:

(b) For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

In addition, Comment [2] of proposed Rule 1.1, derived from Model Rule 1.3, Cmt. [2], described diligence similarly to Model Rule 1.3. The first Commission's comment provided:

Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rules 1.2 and 1.4. The lawyer's duty to act with reasonable

diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Based on the foregoing, the first Commission's decision not to recommend adoption of Model Rule 1.3 does not appear to have been a rejection of diligence as an important standard of professional conduct. Instead, the decision primarily recognized that California's current approach to regulating lawyer competence, which includes diligence as a key factor, was valid and need not be changed.

A minority of the first Commission favored adopting a separate diligence rule. The minority noted that while competence and diligence can be viewed together, they are distinct concepts of professional responsibility and should be so treated. Relying on both the Model Rules and the Restatement of the Law Governing Lawyers, the minority further noted that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. For example, competence requires that a lawyer have sufficient learning and skill to ascertain the applicable statute of limitations; diligence requires that being aware of the period of limitations, the lawyer may not allow it to expire due to the lawyer's neglect and inattention. Former rule 6-101 recognized the foregoing difference by including competence and diligence in separate paragraphs. Every jurisdiction except Texas and California has adopted a separate diligence rule that requires lawyers to act with sufficient commitment and dedication in pursuing a client's matter through to conclusion. Even Texas, however, addresses the concept of diligence in a separate paragraph within its competence rule.

The minority made two other observations in support of a separate diligence rule. First, it noted that "perhaps no professional shortcoming is more widely resented than procrastination." (Model Rule 1.3, Cmt. [3].) Even when the lawyer is competent, neglect and unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer and the legal profession. Second, California case law is consistent with the requirements of Model Rule 1.3. See Vapnek, et al., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group 2009) ¶ 6:92 ff. Yet, by recommending against adoption of Model Rule 1.3, the majority sends the wrong message that diligence is not a distinct obligation in California. The minority concluded by stating that the conflation of competence with diligence in proposed rule 1.1 would serve only to confuse lawyers about these separate and distinct obligations and would result in less public protection.

A public comment letter was submitted by a group of thirty ethics law professors. The group disagreed with the first Commission's view that diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence. The group stated: "We strongly agree with the Commission's minority report with respect to this Rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: paying adequate attention. MR 1.3 and its comments need to be approved by the Board."



Further, a point that was not raised during the first Commission's tenure is the fact that the 1975 California Rules originally contained a separate paragraph that, although part of the "competence" rule, treated diligence as a separate duty independent of competence. Former rule 6-101 was amended in 1983.<sup>2</sup> Thus, former rule 6-101 originally took the same approach as do the Model Rules, the Restatement, and every other jurisdiction.

The first Commission was not persuaded and did not change its view that the concept of diligence in California should continue to be included within the duty of competence. It noted that it had added Comment [2] to the proposed competence rule to clarify the relationship between diligence and competence. The first Commission also noted that there is no evidence that the State Bar has been unable to discipline lawyers for neglect of client matters without a separate rule on diligence.

Although the origin and history of Model Rule 1.3 was not the primary factor in the Commission's consideration of proposed Rule 1.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 65 - 710, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. As discussed in OCTC's comment to proposed rule 1.1, OCTC is concerned with segregating and separating diligence, competence, and supervision into separate rules.
2. OCTC is concerned with Comments 1 and 2, because, as discussed, supervision of an attorney's employees, office, and case is part of lawyer competence.

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<sup>2</sup> Former rule 6-101 provided in its entirety:

**Rule 6-101 Failing To Act Competently**

A member of the State Bar shall not willfully or habitually

(1) Perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill;

(2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed.

The good faith of an attorney is a matter to be considered in determining whether acts done through ignorance or mistake warrant imposition of discipline under Rule 6-101.

Further, these Comments are unnecessary, even if those concepts are separated, because each rule explains what it covers.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
**(In response to 45-day public comment circulation):**

1. As discussed in OCTC's September 27, 2016 letter, OCTC is concerned with segregating and separating diligence, competence, and supervision into separate rules. 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. (See e.g. In the Matter of Riodan (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41; In the Matter of Broadway (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944; In the Matter of Myrdall (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363; In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657; Layton v. State Bar (1990) 50 Cal.3d 889; Gadda v. State Bar (1990) 50 Cal.3d 344; Bernstein v. State Bar (1990) 50 Cal.3d 221; Van Sloten v. State Bar (1989) 38 Cal.3d 921; Franklin v. State Bar (1986) 41 Cal.3d 700; McMorris v. State Bar (1983) 35 Cal.3d 77.) But, under the proposed new rules California will have to develop new law to distinguish among competence, diligence, and failure to supervise. It is also noted that the first Commission did not support distinguishing between competence and diligence.
2. A failure to perform diligently is a failure to perform competently. This is because diligence is an essential part of competence. From the client's perspective, it does not matter why the misconduct occurred but that it occurred. Moreover, distinguishing between competence and diligence is not always easy. The lines between these concepts are often blurry, unclear, and overlapping. For instance, if an attorney does not know or learn the timelines 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, these proposals will cause OCTC to file more charges against each respondent, i.e. OCTC will have to file three charges for what used to be one charge. The proposed rules will also make enforcement more difficult.
3. OCTC is concerned with Comments 1 and 2, because these Comments are unnecessary, even if those concepts are separated, because each rule explains what it covers.

- **State Bar Court:** No comments were received from State Bar Court.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Three comments, including the above comment from OCTC, were received. Two agreed with the proposed rule, and one disagreed. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.3: Diligence,” revised May 13, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf)
- Forty-two jurisdictions have adopted Model Rule 1.3 verbatim.<sup>3</sup> Seven jurisdictions have adopted a slightly modified version of Model Rule 1.3.<sup>4</sup> Two jurisdictions have not adopted a separate rule concerning diligence.<sup>5</sup>

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Concepts Accepted (Pros and Cons):**

1. Recommend adoption of a standalone rule that addresses the concept of diligence rather than retain it as a component of the definition of diligence as in current rule 3-110(B).
  - Pros: There are a number of reasons for California addressing the duty of diligence in a separate, standalone rule:
    - (1) Every jurisdiction, except California, has adopted Model Rule 1.3, has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence, or addresses diligence as a separate duty in its competence rule (Texas). California should do the same for purposes of clarity and consistency.

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<sup>3</sup> The forty-two jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>4</sup> The seven jurisdictions are: Alabama, District of Columbia, Georgia, Massachusetts, New York, Oregon, and Virginia.

<sup>5</sup> The two jurisdictions are: California and Texas. Current rule 3-110(B) includes diligence as a component of the definition of “competence.” Texas rule 1.1 (Competent and Diligent Representation) addresses diligence in a separate paragraph (b), which provides:

(b) In representing a client, a lawyer shall not:

- (1) neglect a legal matter entrusted to the lawyer; or
- (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(2) Although competence and diligence are often viewed together, they are distinct concepts of professional responsibility. The Model Rules and the Restatement of the Law Governing Lawyers provide that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. See, e.g., Rest (3d) Law Governing Lawyers § 16, comment d.

(3) As an example of point (3), competence requires that a lawyer have sufficient learning and skill to ascertain the applicable period of limitations; diligence requires that being aware of the period of limitations, the lawyer must not allow it to expire due the lawyer's neglect and inattention.

(4) Both the Model Rules and the Restatement (as well as text books, ethics opinions and other resources) consistently refer to the lawyer's duty of competence and diligence separately. See, e.g., Model Rule 1.7(b)(1) ("the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"); Rest. (3d) Law Governing Lawyers §16(2) (a lawyer must . . . "act with reasonable competence and diligence.")

(5) Having a separate rule on the duty of diligence that includes a prohibition against undue delay provides needed public protection: "Perhaps no professional shortcoming is more widely resented than procrastination . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Model Rule 1.3, Comment [3].

(6) California case law is consistent with the requirements of Model Rule 1.3. See Vapnek, et. al. CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group. 2015) ¶¶. 6:92 ff.

(7) Having a separate rule on diligence will not materially increase the risk that lawyers will be disciplined for an act of simple negligence. Lack of dedication to a client's matter may be the basis for civil liability but it is not the same as a negligent act or omission under tort law. Rule 1.3 is concerned with indifference and lack of dedication in carrying out the obligations the lawyer has assumed and furthers the lawyer's fiduciary duty of loyalty to zealously represent the client and maintain the client's trust and confidence.

- Cons: There are several reasons not to adopt a standalone rule concerning diligence:

(1) There is good advice in Model Rule 1.3 and in its Comments. As an example, Comment [3] begins: "Perhaps no professional shortcoming is more widely resented than procrastination." However, to the extent that Rule 1.3 were to be applied to the quality of a lawyer's representation of a client, these lawyer's duties are well-understood as being part of current rule 3-110 and

new Rule 1.1. Consequently, Rule 1.3 would amount only to advice about best practices and good client relations.

(2) From a disciplinary standpoint, all that is needed is a rule that provides a basis for disciplining a lawyer whose tardiness causes client harm, and there already are two rules that serve that purpose.

The first is proposed Rule 1.1.

In addition, proposed rule 1.16 [3-700] states the only bases on which a lawyer may terminate a lawyer-client relationship, so that a lack of diligence amounting to client abandonment also can violate rule 3-700/1.16. See, e.g., *In the Matter of Doran*, 3 Cal. State Bar Ct. Rptr. 871, 1998 Calif. Op. LEXIS 6 (1998) (lawyer left a social security benefits hearing because he was “too upset” at a ruling to continue; the hearing went on in the lawyer’s absence; the client’s claim was denied; lawyer found to have violated rules 3-110 and 3-700) and *In the Matter of Aulakh*, 3 Cal. State Bar Ct. Rptr. 690, 1997 Calif. Op. LEXIS 190 (1997) (lawyer held to have violated rules 3-110 and 3-700 for failing to pursue appeal, leading to a default, after having filed a notice of appearance).

(3) The harm in having a Rule 1.3 divorced from any client harm – as this proposed Rule would be – is that it would create a standard for criticizing a lawyer that would be inconsistent with the duty of undivided loyalty to the client. Lawyers constantly and intentionally prioritize client needs based on a host of factors, including the lawyer’s personal life, and should not have to defend themselves when they have done so unless the lack of diligence creates client harm or violates a court order. A rule of that scope would go beyond any conduct that calls into question a lawyer’s fitness to practice law.

(4) Promptness and diligence should be retained where they are. The Restatement 3d of the Law Governing Lawyers, § 16, Reporter’s Note to Comment *d* treats diligence as being a component of competence and not a separate duty, as does current rule 3-110. This is the best resolution. Lawyers should aspire to be prompt, but that does not make it a proper subject of professional discipline.

2. Recommend adoption of a comment that cross-references proposed Rule 1.1 [3-110], concerning a lawyer’s duty to provide competent representation.
  - Pros: In light of the duty of diligence being a component of the definition of “competence” in current rule 3-110(B), a cross-reference to that rule is appropriate.
  - Cons: None identified.

## **B. Concepts Rejected (Pros and Cons):**

1. There were no concepts the Commission considered that were rejected. But see Section IX.E, below.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

## **C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:**

The Commission majority concluded that having a separate rule on diligence will not materially increase the risk that lawyers will be disciplined for an act of simple negligence. Lack of dedication to a client's matter may be the basis for civil liability but it is not the same as a negligent act or omission under tort law. Rule 1.3 is concerned with indifference and lack of dedication in carrying out the obligations the lawyer has assumed and furthers the lawyer's fiduciary duty of loyalty to zealously represent the client and maintain the client's trust and confidence.

Those opposing the rule, on the other hand, take the position that proposed Rule 1.3 would create a novel standard that would move diligence as a requirement of the standard of care and turn it into a duty to the legal system. By divorcing promptness and client harm, this Rule would create the opportunity for a lawyer to be disciplined, or for the lawyer's conduct to be measured for civil purposes (such as in fee collection) by conduct that did not harm and might even have aided the client. Also from a civil standpoint, this Rule if adopted will be used to allege that each unexplained lawyer delay amounts to a breach of fiduciary duty.

## **D. Non-Substantive Changes to the Current Rule:**

None.

## **E. Alternatives Considered:**

The Commission considered but rejected a rule version that more closely aligned with Model Rule 1.3.

## **X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

### **Recommendation:**

That the Commission recommends adoption of proposed Rule 1.3 in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 1.3 in the form attached to this Report and Recommendation.

**XI. DISSENTING POSITION(S)**

The position of the Commission minority is stated in the “Cons” paragraph of Section IX.A.1 and in Section IX.C.





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M E M O

To: Randall Difuntorum  
Kevin Mohr

From: Robert L. Kehr

Date: January 30, 2017

Re: Dissent to proposed Rule 1.3

OCTC has explained in its detailed objection to proposed Rule 1.3 why creating a stand-alone diligence Rule, separating diligence from the duty of competence where it now and always has been, will cause needless problems for it. See, e.g., *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971) (treating diligence as part of the standard of care). I believe that this proposed Rule suffers from defects that go beyond OCTC's concerns.

Current rule 3-110 sets a standard for the quality of a lawyer's representation of a client. The rule 3-110 focus is on client harm because competence is not an abstraction (that is why a lawyer can meet the competence standard by obtaining sufficient learning to do a job properly, even if the lawyer lacks needed skill when accepting an engagement).

Placing diligence in a separate Rule will lead to claims that a lawyer has violated the Rule by delaying a client's work even in the absence of client harm. In fact, the delay might have been at the client's request. An opposing party, to whom the lawyer owes no fiduciary duties, could threaten disciplinary action to try to motivate the lawyer and could claim that it was injured by delay. Any such threat or claim would conflict with the duty of undivided loyalty owed only to the client.

In Commission discussions, my concern was answered by saying that delay in general would be covered by proposed Rule 3.2,<sup>1</sup> so proposed Rule 1.3 deals with client harm. This is not clear. Proposed Rule 3.2 by its terms deals only with litigation, and proposed Rule 1.3 says it applies "in representing a client". That easily is read as a temporal limitation rather than a reference to client injury.

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<sup>1</sup> Rule 3.2 ("Delay of Litigation") states: "In representing a client, a lawyer shall not use means that have no substantial\* purpose other than to delay or prolong the proceeding or to cause needless expense."

Two drafting points: *First*, it is not clear what is meant by “unduly delay” in proposed paragraph (b) (it presumably means something other than client injury or else there would be no need to separate diligence from the competence Rule, but is it something more than feel-good language? ). *Second*, current rule 3-110 permits discipline for lack of competence that is intentional, reckless or repeated, and proposed Rule 1.1 follows this, only adding a standard of gross negligence because that phrase has been used in disciplinary cases (and is taken to mean the same as “reckless”. A single act of simple negligence does not suggest the lawyer is unfit to practice law and therefore never has served as the basis for professional discipline. Proposed Rule 1.3 repeats the standard of intentional, reckless, with gross negligence or repeated. Does this mean that two acts of negligence might satisfy either the Rule 1.1 standard, but the lawyer might not be subject to discipline if one is a lack of diligence coming under Rule 1.3?

Current rule 3-110 is not broken with respect to the need for diligence and does not need fixing. Proposed Rule 1.3 expresses a best practices concept. The application of the current rule is the subject of countless existing authorities and is free from doubt.

I respectfully dissent from proposed Rule 1.3 and would leave diligence in Rule 1.1.