



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Subcommittee on Rules and Ethics Opinions
From: Andrew Kucera
Date: February 14, 2019
Re: Case Law Concerning Attorney Competency (Rule 1.1) as It Relates to Technology and Innovation

Assignment

Research case law and to what extent it has defined or set standards for attorney competency (Rule 1.1) as it relates to tech and innovation. Cases will likely involve email and ESI [(electronically stored information)]. Are existing rulings applicable, or even practical, when discussing new tech? To what extent can attorneys offer “do-it-yourself” products for their clients, without personally speaking with each client? Disclaimers should also be reviewed and considered.

California Rule 1.1

The State Bar of California Rule of Professional Conduct 1.1 states:¹

Rule 1.1 Competence

- (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.

¹ Rule 1.1 was recently revised, effective November 1, 2018.

ABA Model Rule 1.1

For comparison purposes, American Bar Association (ABA) Model Rule of Professional Conduct 1.1 states:

Rule 1.1: Competence

Client-Lawyer Relationship

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The ABA Model Rules of Professional Conduct (ABA Model Rules) also contain a comment to Rule 1.1, relevant to the ATILS Task Force:²

Rule 1.1: Competence – Comment

Client-Lawyer Relationship

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Differences Between California Rule 1.1 and ABA Model Rule 1.1

There are several notable differences between CA Rule 1.1 and ABA Model Rule 1.1.

First, CA Rule 1.1 is phrased as a double negative (“A lawyer shall not...fail to perform legal services with competence”), whereas ABA Model Rule 1.1 is phrased in the affirmative (“A lawyer shall provide competent representation....”)

Second, CA Rule 1.1 restricts its prohibition of failure to perform legal services with competence to failure that is intentional, reckless, with gross negligence, or repeated. In other words, failure to perform legal services with competence that is an isolated incident of simple negligence is not a violation of the rule. ABA Model Rule 1.1 does not so restrict its application. Thus, an isolated incident of simple negligence may violate the rule.

Third, the definition of competence differs. Both rules include learning/knowledge and skill as components, but only CA Rule 1.1 includes “mental, emotional, and physical ability,” and only ABA Model Rule 1.1 includes “thoroughness and preparation.”

Fourth, CA Rule 1.1 contains two exceptions when representation may be undertaken despite the lawyer’s lack of learning and/or skill. These exceptions are absent in ABA Model Rule 1.1.

² ABA Model Rule 1.1, Comment 8, was added to the ABA Model Rules in 2012.

Fifth and last, Comment 8 to ABA Model Rule 1.1 specifically mentions “the benefits and risks associated with relevant technology” as a *recommended* component of “requisite knowledge and skill.” CA Rule 1.1 does not mention technology.

Other State Bar Associations’ Rules Regarding Competence in Technology

According to Robert Ambrogi at www.lawsitesblog.com, 35 states have adopted the duty of technology competence.³ Some states have adopted ABA Model Rule 1.1, Comment 8, verbatim, and some states have adopted the same with additions, changes, and/or deletions.

Rules of Professional Conduct Regarding Competence in Innovation

The assignment mentions “standards for attorney competency (Rule 1.1) as it relates to tech *and innovation*.” (Emphasis added.) Neither CA Rule 1.1 nor ABA Model Rule 1.1 mention innovation, and there does not appear to be an available resource regarding other state bar associations’ rules regarding competence in innovation.

Research case law and to what extent it has defined or set standards for attorney competency (Rule 1.1) as it relates to tech and innovation.

There are 178 California cases (reported and unreported) that cite to CA Rule 1.1⁴. Only six of those cases contain the word “technology” or some variation of it. None of those cases contain the word “innovation” or any variation of it.

The six California cases that cite to CA Rule 1.1 and contain the word technology have nothing to do with technology as a component of competency.

Cases will likely involve email and ESI [(electronically stored information)].

20 of the California cases that cite to CA Rule 1.1 discuss email, however most of those cases cite to email in the context of a general breach of the duty of competence, rather than the failure of understanding or use of email technology as causing the breach (i.e., Solo v. Am. Assoc. of Univ. Women, 2018 WL 4185429, at 1 (S.D. Cal. Aug. 31, 2018).)

Some cases do identify specific problems with the use of email, such as:

- Sending copies of confidential and privileged emails to opposing counsel (Blecher Collins Pepperman & Joye, P.C. v. Mireskandari, 2016 WL 6298751, at 2 (Cal. Ct. App. Oct. 27, 2016).)

³ <https://www.lawsitesblog.com/tech-competence/> as of February 2, 2019.

⁴ And/or its predecessor, Rule 3-110.

- Misuse of email signatures (In Matter of Henriouille, 2015 WL 5895512, at 2 (Cal. Bar Ct. Oct. 1, 2015.))
- Failure to respond to emails from a client (Matter of Boles, 2015 WL 3764938, at 1 (Cal. Bar Ct. June 12, 2015); In the Matter of Seltzer, 2013 WL 5826033, at 4 (Cal. Bar Ct. Apr. 16, 2013); In the Matter of Schweizer, 2012 WL 6209991, at 3 (Cal. Bar Ct. Dec. 11, 2012.))
- Making false statements in an email, which is also a violation of Business & Professions Code section 6106 (In the Matter of Haltom, 2013 WL 1084772, at 4 (Cal. Bar Ct. Mar. 11, 2013.))

I was hoping to find some cases that discussed issues relating to the competent understanding and use of email technology, such as data privacy, encryption, etc. I found no such cases.

Only one case discussed electronically stored information (ESI), however not in the context that the understanding or use of ESI led to a breach of CA Rule 1.1. (See Sabel v. City & Cty. of San Francisco, 2017 WL 3670783, at 3 (N.D. Cal. Aug. 25, 2017.))

California State Bar Ethics Opinions

After finding little in case law, I expanded my search to CA State Bar Ethics Opinions. Several opinions mention technology, and cover the following issues.

- What are an attorney's ethical duties in the handling of discovery of electronically stored information?
 - o [CA Eth. Op. 2015-193](#) (2015): ESI and Discovery Requests
- An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality. (CA Eth. Op. 2015-193 (2015))

- May an attorney maintain a Virtual Law Office practice (“VLO”) & still comply with her ethical obligations, if the communication with the client, and storage of and access to all information about the client’s matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., “Cloud Computing”)?

- o [CA Eth. Op. 2012-184](#) (2012): Virtual Law Office

As it pertains to the use of technology, the Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon an attorney practicing in a traditional law office. While an attorney may maintain a VLO in the cloud where communications with the client, and storage of and access to all information about the client’s matter, are conducted solely via the internet using a third-party’s secure servers, Attorney may be required to take additional steps to confirm that she is fulfilling her ethical obligations due to distinct issues raised by the hypothetical VLO and its operation. Failure of Attorney to comply with all ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described herein. (CA Eth. Op. 2012-184 (2012))

- Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?

- o [CA Eth. Op. 2010-179](#) (2010): Confidentiality and Technology

Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client’s devices and communications. (CA Eth. Op. 2010-179 (2010))

- May an attorney-client relationship be formed with an attorney who answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship on a radio call-in show or other similar format?⁵

- o [CA Eth. Op. 2003-164](#) (2003) Formation of Attorney-Client Relationship

The context of a radio call-in show or other similar format is unlikely to support a reasonable belief by the caller that the attorney fielding questions is agreeing implicitly to

⁵ Although this opinion does not discuss technology in substance, it is on point with other related issues that the Rules & Ethics Subcommittee has been discussing.

act as the caller's attorney or to assume any of the duties that flow from an attorney-client relationship. (CA Eth. Op. 2003-164 (2003))

Interestingly enough, several of the above ethics opinions cite to ABA Model Rule 1.1, Comment [8], in their discussion of the attorney's duty of competence.

Are existing rulings applicable, or even practical, when discussing new tech?

This question probably cannot be answered with any confidence based on this research. Case law is not instructive. Ethics opinions are instructive, but aren't designed to be forward-looking and generally do not discuss "new" technologies.⁶ The ethics opinions that are instructive are relatively fact-dependent. Guidelines for technologies that might be considered "new" are somewhat vague.

The following excerpts from CA State Bar Ethics Opinions are relevant (cited in full above, and generalized here):

- "An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law."
- "Attorney competence related to [a particular practice area] generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to [technology used in that practice area.]"
- "On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability."
- "[An] attorney may be required to take additional steps to confirm that [he or] she is fulfilling [his or] her ethical obligations due to distinct issues raised by [that attorney's use of specific technology.]"
- "Whether an attorney violates his or her duties of confidentiality and competence when using technology ... will depend on the particular technology being used and the circumstances surrounding such use."

Probably the most useful Ethics Opinion relative to the use of new technology is 2010-179.

Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate:

- 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;
- 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information;

⁶ Virtual law offices and cloud computing may not have been commonly used technologies in 2010-2012, but they certainly weren't new. Discovery of ESI raised technology issues well before 2014-2015.

- 3) the degree of sensitivity of the information;
- 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;
- 5) the urgency of the situation; and
- 6) the client's instructions and circumstances, such as access by others to the client's devices and communications

However, what constitutes "appropriate steps" can be the subject of much debate.

To what extent can attorneys offer "do-it-yourself" products for their clients, without personally speaking with each client?

This is somewhat addressed by Ethics Opinion 2003-164, at least as an outside boundary. A full answer would require more analysis of how and when an attorney-client relationship would be formed, which would depend on the specific technology being considered. There is a good discussion of this generally in Ethics Opinion 2003-164, at Pages 3-4⁷, however the facts of that case have little to do with technology.

[T]he courts have looked to a number of factors in assessing whether the totality of circumstances warrants concluding that an attorney-client relationship has been formed absent express agreement of the attorney and client. Those factors include:

- (1) Whether the attorney volunteered his or her services to a prospective client.
- (2) Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case.
- (3) Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question.
- (4) Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice.
- (5) Whether the individual paid fees or other consideration to the attorney in connection with the matter in question.
- (6) Whether the individual consulted the attorney in confidence.
- (7) Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity.

Again, the inquiry is based on the totality of the circumstances. No single factor is necessarily dispositive.

⁷ Citing California Ethics Opinion 2003-161, at pages 3-4.

Again though, I would caution anyone against using Ethics Opinion 2003-164 prospectively, as a guideline for whether and to what extent attorneys can use technology to replace personal communication. In sum, it is far from an exact science to determine how new technology affects the creation of an attorney-client relationship.

Disclaimers should also be reviewed and considered.

Disclaimers are discussed in Ethics Opinion 2003-164, but again this opinion doesn't discuss the use of new technology. The opinion does cite to the attorney's screening and on-air disclaimers as facts that weigh against the formation of an attorney-client relationship, and presumably this application would carry over to the formation (or not) of an attorney-client relationship in a model that includes new technology.