



# 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: Kevin Mohr  
Date: March 26, 2019  
Re: B.2. Adoption of a new Comment to Rules of Professional Conduct, rule 1.1,  
regarding a lawyer's duty to be familiar with relevant technology

The Subcommittee on Rules and Ethics Opinions moves to recommend the addition of the following language as Comment [1] to Rule 1.1:

**The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.**

During the February 28, 2019 ATILS meeting, the subcommittee reached an agreement that including language in a rule of professional conduct that specifically references technology would encourage the use of technology by lawyers. Additionally, the subcommittee recognized that part of the Task Force's charge to protect the public while increasing access to justice. While the subcommittee did not conclude that this proposal would necessarily increase access to justice, it recognized that the proposal is a step towards public protection that its members believe will be necessary in combination with other anticipated proposed changes.

The subcommittee discussed whether this comment was necessary in light of the State Bar Ethics opinions that already embrace the substance of this proposed comment. See, e.g., State Bar Formal Opns. 2016-196; 2015-193; 2013-188; 2012-186; 2012-184; 2010-179. The subcommittee concluded that relying solely on ethics opinions to educate California lawyers that the interaction of various rules requires a lawyer to be familiar with technology creates complications as the opinions are merely persuasive authority.

Consequently, the subcommittee determined that the Rules of Professional Conduct should recognize that the lawyer's familiarity with and competence in using relevant technology is a duty. The subcommittee first considered whether a reference to technology should be included in the black letter of rule 1.1, the rule that sets forth a lawyer's duty to provide competent representation. The subcommittee did not reach consensus on this point.

The subcommittee then considered including a comment similar to Comment [8] to ABA Model Rule 1.1, which provides in relevant part:

"[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 . . . ."

The subcommittee rejected the Model Rule's use of the word "should" as being merely aspirational, notwithstanding that many commentators have interpreted the language to impose a duty on lawyers. Instead, the subcommittee looked to the language of former California Rule 3-110, Discussion section of which had provided in relevant part:

“The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”

The subcommittee determined that drafting a comment similar to the Discussion section to former rule 3-110 is preferable to the Model Rule approach because it could not be interpreted as adding to a lawyer’s duties, which is not a permitted use of a comment.<sup>1</sup> Instead, the subcommittee determined that using the syntax and general style of the former rule Discussion would be viewed as merely elucidating what the black letter of the rule encompasses. Explaining the scope of a rule’s application is an appropriate use of a comment. Moreover, that competence includes a familiarity with and appreciation of relevant technology is supported by the several State Bar ethics opinions on this topic.

In addition to the foregoing considerations, the subcommittee discussed including the word “innovation” in the comment, but the consensus was not to include that concept.

Finally, the subcommittee considered whether the term “technology” should be further limited by the phrase “relevant to your area of practice” rather than by a reference to “relevant.” There was consensus on the subcommittee that a requirement to keep abreast of *all* technology related to law practice would be excessive. The question was whether a lawyer should only be required to be familiar with technology relevant to the lawyer’s particular area of practice. Some subcommittee members favored this language. Others felt this further clarification was unnecessary because the word “relevant,” also found in the ABA Model Rule comment, signaled that keeping abreast of *all* technology was not the intent of the comment. After discussion, a slight majority of the subcommittee preferred to exclude the language and follow the ABA approach of using the single word, “relevant.”

A copy of rule 1.1, with the proposed comment language, is attached as Attachment 1.

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<sup>1</sup> The Charter of the Second Rules Revision Commission provided in pertinent part:

6. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.

## Attachment 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.

### Comment

[\[1\] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.](#)

~~[1]~~<sup>[2]</sup> 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]~~<sup>[3]</sup> See rule 1.3 with respect to a lawyer’s duty to act with reasonable\* diligence.