



The State Bar of California

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

To: Rules and Ethics Opinions Subcommittee
From: Kevin Mohr
Date: June 17, 2019
Re: B.1. Recommendation: Adoption of a new Comment [1] to Rule of Professional Conduct 1.1

Recommendation Approved by the Task Force: Adoption of a new Comment [1] to Rule of Professional Conduct 1.1

During its April 8, 2019 meeting, the Task Force voted to recommend, as part of its Report, the Rules Subcommittee's proposed addition of a comment addressing technology competence to California Rule of Professional Conduct ("CRPC") 1.1. This memorandum provides a summary of that recommendation.

The proposed amendment to CRPC 1.1, which would be added as new comment [1], provides:

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.

(The Task Force voted 13 for, 0 against, with 3 abstentions to recommend the addition of the proposed comment.)

How the Recommendation Relates to the Charter: In recommending the proposed comment, the Task Force considered its Charter, which includes the direction to:

2) Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need.

Pros:

1. Including a comment to the competence rule, CRPC 1.1, that recognizes a lawyer's duty to be familiar with and be competent in using relevant technology will alert lawyers to that duty and provide them with an incentive to adopt and incorporate useful technology in their practices. Such adoptions can have a beneficial effect on a practice's efficiency, which can in turn lead to reduced costs that can be passed on to clients.
2. Although there exist State Bar Ethics opinions that have already embraced the substance of the proposed comment, (see, e.g., State Bar Formal Opns. 2016-196; 2015-193; 2013-188; 2012-186; 2012-184; 2010-179), such opinions are merely persuasive. Further those opinions for the most part rely on reasoning that depends on the interaction of various rules that can create confusion. A direct statement of the lawyer's duty is preferable in providing the aforementioned incentives for lawyers to familiarize themselves with, and adopt available legal technology.

3. A comment is preferable to black letter text. There are many different kinds of knowledge and skills that serve as the foundation for a lawyer's competent delivery of legal services. For example, the [ABA MacCrate Report on Law Schools and the Profession \(1992\)](#) identified 10 separate skills and four values that every lawyer should possess. A black letter rule on competence should be more generally written, i.e., it should identify the general components of competence, with comments included to flesh out the more generally-stated components. That is precisely what CRPC 1.1 does by defining "competence" in providing any legal service to mean that a lawyer applies "the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service." Familiarity with the benefits and risks of using technology in providing legal services is just one aspect of the knowledge and skills a lawyer must bring to bear in providing services to a client. The proposed comment clarifies that.
4. Using a comment to clarify the scope of a rule is preferable to the ABA Model Rule approach.¹ First, the comment to ABA Model Rule 1.1 uses the word "should," which is merely aspirational in nature. Such non-mandatory language is not appropriate in a disciplinary rule. Second, including a comment similar to the Discussion section to former rule 3-110² is preferable to the Model Rule approach because such language could not be interpreted as adding to a lawyer's duties, which is not a permitted use of a comment.³ Instead, using the syntax and general style of the former rule Discussion should 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.
5. Importantly, a lawyer's familiarity not only with the benefits of technology, but also its risks, e.g., the risk of confidential client information being disclosed when using electronic means of communication, should also enhance client protection.
6. The addition of the comment would bring California in line with a substantial majority of jurisdictions that have incorporated the ABA Model Rule comment into their rules.⁴

¹ Model Rule 1.1, cmt. [8], provides in relevant part: "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" (Emphasis added)

² Former rule 3-110, Discussion ¶1.1, a comment intended to clarify the scope of a lawyer duties under the former rule, 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 proposed comment similarly is intended to clarify the scope of a lawyer's duties under CRPC 1.1.

³ 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.

⁴ As of December 2018, 17 jurisdictions have adopted a comment identical or substantially similar to Comment [8] to ABA Model Rule 1.1. See [ABA, Variations of the ABA Model Rules of Professional Conduct, Rule 1.1 \(12/11/18\)](#).

The Charter of the Second Rules Revision Commission provided in pertinent part:

Cons:

1. Referring to the benefits and risks of technology use in the black letter text will more effectively educate lawyers on their duties when employing technology to provide legal services. Many lawyers will focus only on the black letter text and ignore the comments.
2. It is possible that the comment could have the opposite effect on lawyers and discourage them from adopting useful technology for fear of being held in breach of a duty if the technology is used incorrectly.

Clean and redline versions of proposed CRPC 1.1 are included as Attachments 1 and 2, respectively.

4. The Commission's revisions should eliminate or minimize, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.

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]~~[2] 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]~~[3] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

Attachment 2

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.](#)

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[\[3\]](#) See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.