



---

To: ATILS Task Force  
From: Staff (includes October materials from Allen Rodriguez)  
Date: November 6, 2019  
Re: D.4. Recommendation 3.0: Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

---

**Meeting Plan:**

For the November 6<sup>th</sup> meeting, there will not be any subcommittee break-out sessions. The Task Force will meet as a whole to discuss the various recommendations under the Task Force’s two broad concepts for regulatory reform. An outline of the plan is provided below and is consistent with the meeting agenda.

1. UPL Exceptions (Agenda Item B)  
(Recommendations: 1.0; 1.1; 2.0; 2.1; 2.2; 2.3; 2.4 and 2.5)
  - Exceptions for Individuals
  - Exceptions for Entities/Organizations
2. Fee Sharing/Non-lawyer Ownership (Agenda Item C)  
(Recommendations: 3.1; 3.2; and 3.3)
  - Compensation for Referrals, Including “Running and Capping” (CRPC 5.4 & 7.2(b))
  - Passive Investment
  - Protecting Independent Professional Judgment, Including Lawyer Majority Ownership (CRPC 5.4)
  - Provision of Law Related Services (ABA Model Rule 5.7)
3. Other Proposals (Agenda Item D)  
(Recommendations: 1.2; 1.3; 2.6; 3.0; and 3.4)
  - Findings re Proposing Definitions of “AI” and the “Practice of Law”
  - Funding of Regulatory Programs and Data Collection/Success Metrics
  - Technology Competence (CRPC 1.1)
  - Advertising and Solicitation Rule Revisions (CRPC 7.1 – 7.5)

**Recommendation 3.0:**

Recommendation 3.0 will be discussed with other related other proposals. Recommendation 3.0 has received a total of approximately 76 written comments, 49 in opposition, 25 in support, and 2 with no stated position. Staff has completed processing of all written comments received and the public hearing testimony. Updated public comment synopsis tables and the full text of public comments are available at the ATILS DropBox.

Some of the general themes derived from the written public comments, the public hearing testimony, various articles, podcasts, social media posts and the oral input conveyed at the bar association Town Hall Outreach meetings include the following:

- Requiring all lawyers to maintain competence in legal technology may unduly burden certain lawyers, such as elderly lawyers and solo practitioners.
- A lawyer should not be disciplined for not understanding the benefits of a particular technology; instead, a lawyer should only be accountable for conduct when actually using technology in a client's representation.
- Competence, in regards to technology, is already addressed in California ethics opinions.

Percentages showing categories of commenters and the relative positions expressed by those commenters is summarized in the table provided below.

<b>Proposal 3.0</b>	<b>Total</b>	<b>Support</b>	<b>Oppose</b>	<b>SNP</b>
Lawyer	67%	24%	73%	4%
Public Member	1%	100%	0%	0%
Lawyer Organization (bar association, law firm, legal aid)	21%	38%	63%	0%
Public Organization (insurance companies, non and for profit nonlawyer organization)	1%	100%	0%	0%
Unknown (not enough information)	9%	71%	29%	0%
<b>Total</b>	<b>100%</b>	<b>33%</b>	<b>64%</b>	<b>3%</b>

For the October meeting, the Task Force member(s) assigned to Recommendation 3.0 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 3.0. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

<b>Oppose (1)</b>	<b>Support (5)</b>	<b>Support if Modified (3)</b>	<b>Support if Nonprofit (0)</b>	<b>Support if Sandbox/Pilot Program (0)</b>	<b>Support if Nonprofit Sandbox/Pilot Program (0)</b>	<b>Other Reform (1)</b>
LACBA SFSP (Furman) <a href="#">[909i]</a>	Los Angeles County Bar Association (Brot) <a href="#">[1355i]</a>	Orange County Bar Association <a href="#">[1134i]</a>				LACBA PREC (Krueger) <a href="#">[1063f]</a>
	Association of Discipline Defense Counsel (Lear) <a href="#">[1364i]</a>	California Lawyers Association (Rosing) <a href="#">[1363d]</a>				

Oppose (1)	Support (5)	Support if Modified (3)	Support if Nonprofit (0)	Support if Sandbox/Pilot Program (0)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (1)
	Consumer Attorneys of California (Serna) [1097l]	The Court Buddy Company (McGlone) [774m]				
	Multiple San Diego Attorneys (McIntyre) [1062g]					
	State Bar of California COPRAC (Bomse) [1229p]					

*The recurring points table circulated at the October meeting has been updated to accept the proposed responses provided by the members assigned to this recommendation. Any new recurring points found in public comments that were not considered at the October meeting have been added.*

Recommendation 3.0 (Rule 1.1 Competence Rule Tech Comment)[Rules/Ethics Opns]	
Recurring Point	Possible Response
Too busy keeping up with developments in the law to keep abreast of all the “latest and greatest” technology. This obligation would unfairly “handicap” senior attorneys.	<p>The inclusion of this concept in the comment to rule 1.1 is consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.) It is also consistent with the comments to ABA Model Rule 3.0 as adopted by a majority of U.S. jurisdictions. (See: <a href="https://www.lawsitesblog.com/tech-competence">https://www.lawsitesblog.com/tech-competence</a>)</p> <p>The Task Force is not aware of any disparate impact on senior attorneys.</p>
Technology is constantly changing. Because of this, there is no way to ensure that any person is fully up to date with all changes that might possibly be relevant at all times.	The inclusion of this concept in the comment to rule 1.1 does not establish a disciplinable duty independent of the professional responsibilities imposed by the terms of the rule. Rule 1.1 only prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. This would appear to be a reasonable minimum public protection standard for a lawyer’s familiarity with

<b>Recommendation 3.0 (Rule 1.1 Competence Rule Tech Comment)[Rules/Ethics Opns]</b>	
<b>Recurring Point</b>	<b>Possible Response</b>
	technology used in the practice of law.
Given how quickly technology is changing, attorneys should keep up to date with how it affects legal practice. [Support]	The Task Force agrees that competent use of technology in the practice of law should be encouraged as it can promote new efficiencies that improve the client experience and lower the cost of legal services.
Implementing technology is of the utmost importance when it comes to the justice system. I believe evolution in tech will help cases become shut easier and waste less tax dollars. [Support]	The Task Force agrees that competent use of technology in the practice of law should be encouraged as it can promote new efficiencies that improve the client experience and lower the costs of legal services.
Case law already recognizes an attorney's obligation to remain up to date on best practices, including technological advances.  Adding the suggested comment to Rule of Professional Conduct 1.1 may be appropriate. [Support]	The Task Force agrees that adding the new comment is appropriate.
This rule to "keep abreast of the changes" is a desire without any ability to enforce or regulate. If the State Bar cannot enforce the rule, then it should not change the language.	The inclusion of this concept in the comment to rule 1.1 is consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.) It is also consistent with the comments to ABA Model Rule 3.0 as adopted by a majority of U.S. jurisdictions. (See: <a href="https://www.lawsitesblog.com/tech-competence">https://www.lawsitesblog.com/tech-competence</a> )  The Task Force is not aware of any negative effects related to this specific language in those majority jurisdictions.