



The State Bar of California

ATILS Agenda Item B.3.
[Rule 1.1 Competence]
02-04-20 Meeting

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Kevin Mohr and Randall Difuntorum
Date: January 30, 2020
Re: Revised Rule 1.1 (Competence)

Executive Summary

At ATILS' [December 12, 2019 meeting](#) (agenda B.3), the task force approved a proposal to recommend to the Board the [concept of an amendment to RPC 1.1](#) (Competence) that would add a new comment providing that the duty of competence encompasses a duty to keep abreast of the changes in the law and law practice, including the benefits and risks associated with relevant technology. This memorandum seeks task force approval of the information that would be used to explain and support this proposal in ATILS' final report and recommendation to the Board.

Discussion

The Recommendation Approved by ATILS:

The task force recommends to the Board the concept of an amendment to RPC 1.1 (Competence) that would add a new comment providing that the duty of competence encompasses a duty to keep abreast of the changes in the law and law practice, including the benefits and risks associated with relevant technology.

The RPC amendment concept approved for recommendation to the Board is set forth in the illustration draft below (redline/strikeout shows changes to [current RPC 1.1](#)):

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.

[\[12\]](#) 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.

[\[23\]](#) See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

ATILS Charter and Request for Public Comment:

In part, ATILS’ charter instructs the task force to:

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.

This proposal was included in ATILS’ request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the RPCs. It was issued as Recommendation 3.0 as set forth below and the concept of this proposal was not materially changed following consideration of public input.

Rules of Professional Conduct Recommendations

- 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.

What will this recommendation do? – To help lawyers be mindful of how technology can enhance the delivery of legal services, this amendment to existing rule 1.1 (Competence) would add a Comment to the rule stating that attorneys have a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

The pros and cons of this proposal considered by the task force are summarized below:

Pros:

1. Including a Comment to the competence rule, rule 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 are 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, for example, it should identify the general components of competence, with comments included to flesh out the more generally-stated components. That is precisely what rule 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 3-110 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. 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 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.

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)

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.

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.

Major Themes in the Public Comment Received:

Recommendation 3.0 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. 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 are listed below together with the task forces' response.

- Requiring all lawyers to maintain competence in legal technology may unduly burden certain lawyers, such as elderly lawyers and solo practitioners.

Task Force Response: The inclusion of this concept in the comment to rule 1.1 is consistent with the comments to ABA Model Rule 3.0 as adopted by a majority of U.S. jurisdictions. (See: <https://www.lawsitesblog.com/tech-competence>.) It is also consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.) No evidence was presented to the task force of any disparate impact on senior attorneys or solo practitioners arising from these existing authorities.

- Given how quickly technology is changing, attorneys should keep up to date with how it affects legal practice.

Task Force Response: 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.

- 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.

Task Force Response: 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 technology used in the practice of law.

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

Proposal 3.0	Total	Support	Oppose	SNP
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%
Total	100%	33%	64%	3%

The table below presents selected comments that reflect the various general positions taken on the proposal. As shown, support was received from lawyer organizations. Commenters asserting modifications to the proposal include a recommendation to revise the comment language to more closely track the terms of the rule itself by focusing on competence in performing a legal service.

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)
LACBA SFSP (Furman) [909l]	Los Angeles County Bar Association (Brot) [1355l]	Orange County Bar Association [1134i]				LACBA PREC (Krueger) [1063f]
	Association of Discipline Defense Counsel (Lear) [1364l]	California Lawyers Association (Rosing) [1363d]				
	Consumer Attorneys of California (Serna) [1097l]	The Court Buddy Company (McGlone) [774m]				
	Multiple San Diego Attorneys (McIntyre) [1062g]					

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)
	State Bar of California COPRAC (Bomse) [1229p]					

Alternatives Considered

The drafting team considered revising the rule itself rather than the comments to the rule. This approach was not recommended by the drafting team because the concept of competence in technology is only one example of the broader category of knowledge about the practice of law that might lead to incompetent representation of a client. As an example, it is a concept that is appropriate for the comments to the rule.

Conclusion and Possible Next Steps

Should the Board agree with this proposal, it is anticipated that a proposed amendment to RPC 1.1 would be drafted and issued for public comment and following consideration of that public comment presented to the Board for adoption. If adopted by the Board, the proposed amendment would be submitted to the California Supreme Court for approval (see Bus. & Prof. Code §§ 6076 & 6077).