



The State Bar of California

ATILS Agenda Item B.8.
[Rule 1.1 Competence]
02-24-20 Meeting

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Kevin Mohr and Randall Difuntorum
Date: February 18, 2020
Re: B.8. Revised Rule 1.1 (Competence)

Short Statement of the Recommendation

ATILS recommends that the Board of Trustees adopt a proposed amended Rule of Professional Conduct 1.1 that would add a new comment providing that a lawyer's 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.

Discussion

The Task Force recommends that the Board adopt a proposed amended Rule of Professional Conduct 1.1 that would add a new comment providing that a lawyer's 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 proposal is a variation of a similar comment to ABA Model Rule 1.1 that expressly addresses a lawyer's technology competence.¹ The proposed amendment approved for recommendation to the Board is set forth 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

¹ Comment [8] to ABA Model Rule 1.1 provides that: "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."

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.

~~[4]~~ 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]~~ 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.

Adding the Task Force's proposed comment to the competence rule responds to the charter by clarifying that a lawyer has a responsibility to be familiar with, and be competent in, using relevant technology. By expressly addressing technology competence the rule would facilitate a lawyer's or law firm's implementation of technology in their practices in a professionally responsible manner. This responsible use of technology could have a beneficial effect on a law practice's efficiency, which could in turn lead to savings that can be passed on to clients. 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. According to one legal journalist, 38 states have adopted a version of the ABA Model Rules duty of technology competence (see, <https://www.lawsitesblog.com/tech-competence>).

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 Rules of Professional Conduct. It was issued as recommendation 3.0 as set forth below.

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.

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 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. Moreover, to the extent the public comment might be viewed as asserting that a lawyer should not be required to become an expert in relevant technology, that is not at all what is intended. The comment merely recognizes that lawyers have a duty to provide their clients with competent legal services which, in some instances would call for the lawyer to employ technology in the representation. The lawyer himself or herself would not be required to become expert in the particular technology but instead might be expected to associate with someone else who is, which rules 1.1(c) and 5.3 explicitly recognize.

- 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 efficiencies that improve the quality of representation while lowering 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. Unless the lawyer's failure was intentional, reckless or grossly negligent, a single failure would not constitute grounds for discipline. This would appear to be a reasonable minimum public protection standard for a lawyer's familiarity with technology used in the practice of law.

Conclusion and Possible Next Steps

Should the Board agree with this proposal, it is anticipated that the proposed amendment to rule 1.1 would be considered for a 60-day public comment period and following consideration of that public

comment be presented to the Board for adoption. (A clean version of the proposed amended rule is provided as Attachment A.) If adopted by the Board, the proposed amendment would be submitted to the California Supreme Court for approval (see Bus. & Prof. Code §§ 6076 & 6077).

ATTACHMENT A

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