

HEADLINE: Proposed Amended California Rule of Professional Conduct 1.1 (Competence)

SUBHEAD: The State Bar seeks public comment regarding proposed amended California Rule of Professional Conduct 1.1. The proposed amendment 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.

Direct comments to

Comments should be submitted using the online Public Comment Form. The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

Deadline

May 18, 2020

Background

The California Rules of Professional Conduct are attorney disciplinary rules. By statute, the Board of Trustees has the authority to adopt amendments to the rules that are binding upon attorneys once those rules are approved by the Supreme Court of California. (Business and Professions Code sections 6076 and 6077.)

In July, 2018, the Board established a Task Force on Access Through Innovation of Legal Services (ATILS) pursuant to Goal 4, Objective d., of the State Bar's 2017-2022 Strategic Plan:

Commencing in 2018 and concluding no later than March 31, 2020, study online service delivery models and determine if any regulatory changes are needed to better supports and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

Discussion/Proposal

At the Board's March 12, 2020, Board Meeting, ATILS presented their final report and recommendation to the Board. Included in this report were seven recommendations. One of the recommendations was for the Board to issue for public comment an amended Rule of Professional Conduct 1.1 (Competence) 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.

At its meeting on March 12, 2020, the Board of Trustees authorized a 60-day public comment period. It was also clarified that authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed changes.

Any fiscal/personnel impact

None

Background material

- [Proposed Rule 1.1 – Clean and Redline](#)
- [Board of Trustees Agenda Item – Report and Recommendations of the Task Force on Access Through Innovation of Legal Services](#)
- [State Bar of California Task Force on Access Through Innovation of Legal Services Final Report and Recommendations](#) (The Task Force’s recommendation on rule 1.1 is discussed on pp. 19 – 21.)

Source

The Task Force on Access Through Innovation of Legal Services (ATILS) drafted this proposed rule revision. Please note: ATILS will sunset on March 31, 2020. As a result, the Board has directed the State Bar of California Standing Committee on Professional Responsibility and Conduct to receive and review the public comments for this item.

Deadline

May 18, 2020

Direct comments to

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Proposed Amended Rule 1.1, Clean and Redline

Rule 1.1 Competence (Clean Version)

- (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.

Proposed Amended Rule 1.1, Clean and Redline

Rule 1.1 Competence (Redline Version to the Current California Rule)

- (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.

~~[4]~~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.

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Michael Young
City	Redlands
State	California
Email address	myoung@michaelyounglaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Matthew
City	Los Angeles
State	California
Email address	whitten@dfis-law.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>It is crucial in this day and age to have all practicing attorneys aware of the potential impact, positive or negative, of technologies that are, or can be, involved in their practice of law. It is a disservice to clients when attorneys do not take full advantage of available technology, particularly if due to ignorance of the technology's existence and/or benefits, to aid their practice. California should take all reasonable steps to help practitioners modernize their practice to provide more thorough, efficient, and environmentally-conscious services to clients.</p>

HEADLINE: Proposed Amended California Rule of Professional Conduct 5.4 (Financial and Similar Arrangements with Nonlawyers)

SUBHEAD: The State Bar seeks public comment regarding proposed amended California Rule of Professional Conduct 5.4. The proposed amendment 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.

Direct comments to

Comments should be submitted using the online Public Comment Form. The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

Deadline

May 18, 2020

Background

The California Rules of Professional Conduct are attorney disciplinary rules. By statute, the Board of Trustees has the authority to adopt amendments to the rules that are binding upon attorneys once those rules are approved by the Supreme Court of California. (Business and Professions Code sections 6076 and 6077.)

In July, 2018, the Board established a Task Force on Access Through Innovation of Legal Services (ATILS) pursuant to Goal 4, Objective d., of the State Bar's 2017-2022 Strategic Plan:

Commencing in 2018 and concluding no later than March 31, 2020, study online service delivery models and determine if any regulatory changes are needed to better supports and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

Discussion/Proposal

At the Board's March 12, 2020, Board Meeting, ATILS presented their final report and recommendation to the Board. Included in this report were seven recommendations. One of the recommendations was for the Board to issue for public comment an amended Rule of Professional Conduct 5.4 (Financial and Similar Arrangements with Nonlawyers) that would expand the existing exception for fee sharing arrangements with a nonprofit organization by adding an exception which provides where the legal fee is not court awarded, but arises from settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the nonprofit organization, provided that the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code.

At its meeting on March 12, 2020, the Board of Trustees authorized a 60-day public comment period. It was also clarified that authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed changes.

Any fiscal/personnel impact

None

Background material

- [Proposed Rule 5.4 – Clean and Redline](#)
- [Board of Trustees Agenda Item – Report and Recommendations of the Task Force on Access Through Innovation of Legal Services](#)
- [State Bar of California Task Force on Access Through Innovation of Legal Services Final Report and Recommendations](#) (The Task Force’s recommendation on rule 5.4 is discussed on pp. 17 – 19.)

Source

The Task Force on Access Through Innovation of Legal Services (ATILS) drafted this proposed rule revision. Please note: ATILS will sunset on March 31, 2020. As a result, the Board has directed the State Bar of California Standing Committee on Professional Responsibility and Conduct to receive and review the public comments for this item.

Deadline

May 18, 2020

Direct comments to

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Rule 5.4 Financial and Similar Arrangements with Nonlawyers (Clean Version)

- (a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
 - (1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*
 - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
 - (3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
 - (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or
 - (5) where a nonprofit organization employs, retains , recommends, or facilitates employment of a lawyer in a matter, (i) the lawyer or law firm* may share with or pay a court-awarded legal fee to that nonprofit organization, and (ii) where the legal fee in the matter is not court awarded but arises from a settlement or other resolution of the matter, the lawyer or law firm may share or pay the legal fee to the nonprofit organization, provided that the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:
 - (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;

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- (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
- (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5), as just one example, permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by paragraph (a)(5) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068(m).

[5] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

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[6] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other than Client).

Appendix 7: Proposed Amended Rule 5.4, Clean and Redline

Rule 5.4 Financial and Similar Arrangements with Nonlawyers (Redline Version to the Current California Rule)

- (a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*
 - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
 - (3) a lawyer or law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
 - (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or
 - ~~(5) a lawyer or law firm* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm* in the matter.~~
 - (5) where a nonprofit organization employs, retains, recommends, or facilitates employment of a lawyer in a matter, (i) the lawyer or law firm* may share with or pay a court-awarded legal fee to that nonprofit organization, and (ii) where the legal fee in the matter is not court awarded but arises from a settlement or other resolution of the matter, the lawyer or law firm may share or pay the legal fee to the nonprofit organization, provided that the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:

Appendix 7: Proposed Amended Rule 5.4, Clean and Redline

- (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;
 - (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
 - (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5), as just one example, permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

~~[4]~~[4] Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by paragraph (a)(5) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068(m).

Appendix 7: Proposed Amended Rule 5.4, Clean and Redline

[5] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[56] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other than Client).

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	Crispin Passmore
City	Kenilworth
State	California
Email address	crispin.passmore@passmoreconsulting.co.uk
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I am a UK resident and offer my advice as an expert in regulation and the legal market. I have over 15 years very senior experience in reforming the legal market of England & Wales and now run a consultancy business working with law firms, legal businesses and regulators across the UK, US and the rest of the world. I started out running the UK's largest non profit Law Centre - as a non-lawyer/ human.

First I would remind the Board of its obligation to act in the public interest rather than the interest of lawyers. There is shortage of supply - all of the evidence points to underserved individual and small businesses consumers and badly served corporate clients. Increasing supply is likely to assist with innovation and competitive pressures that are at the heart of our economies.

The proposals are weak and insignificant though they should not be opposed. They should also be modified to allow non-lawyer ownership in for profit organisations.

obvious: clients keep coming back to these businesses and they are growing the legal market. 25 million US adults and almost all Fortune 500 are ahead of you.

Therefore your proposals are too timid. They should be amended to allow full non lawyer ownership so that you can bring the established and successful business into the regulatory environment and ensure a level playing field. That would give you oversight over what is already happening - it answers the real question of whether these business should be regulated or left unregulated.

So I support your proposed change but it is a tiny step of a large journey. Each year you delay means that the unregulated market grows and moves further beyond your reach. Each year you delay means more Californian residents and small business miss out on legal advice that can improve their lives.