

## EXCERPT OF ATILS FINAL REPORT TO THE BOARD OF TRUSTEES

### **Recommendation No. 2:**

**Issue for Public Comment an 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 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.<sup>14</sup> A clean version of ATILS' proposed amended rule 1.1 and a redline/strikeout version showing changes to the current rule are provided as Appendix 8.

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<sup>14</sup> 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."

**Relationship to the ATILS Charter:** 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 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 while Comments to the rules are Supreme Court approved guidance for “interpreting and practicing in compliance with the rules.” (See rule 1.0(c) regarding the purpose of Comments.) According to one legal journalist, 38 states have adopted a version of the ABA Model Rules Comment on technology competence (see, <https://www.lawsitesblog.com/tech-competence>).

**Public Comment:** 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.

Recommendation 3.0 received a total of approximately 76 written public comments, 49 in opposition, 25 in support, and two with no stated position. Public comment themes, along with the Task Force’s responses to each, are outlined below.

1. 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 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.

2. 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.

3. 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 Next Steps:** ATILS believes that the proposed Comment will help lawyers appreciate the ever-increasing role that technology plays in the practice of law. Should the Board agree with this proposal, it is anticipated that proposed amended rule 1.1 would be issued for a 60-day public comment period. If ultimately adopted by the Board, the proposed amendment would need to be submitted to the California Supreme Court for approval (see Bus. & Prof. Code, §§ 6076 & 6077).

### **Recommendation No. 3**

**Issue for Public Comment a New Rule of Professional Conduct 5.7 Addressing the Delivery of Nonlegal Services Provided by Lawyers and Businesses Owned or Affiliated with Lawyers**

**Summary of the Recommendation:** ABA Model Rule 5.7 addresses a lawyer’s provision of law-related services. It describes when a lawyer’s provision of such services would be subject to the rules and when it would not be. California does not have a version of Model Rule 5.7, but the issue of the Rules’ application when lawyers provide nonlegal services has been addressed in disciplinary common law, including Supreme Court precedent, and in advisory ethics opinions. Because there is no rule, however, lawyers may be unsure of their duties in such situations and reluctant to explore innovative delivery systems for nonlegal services as well as combined nonlegal and legal services. ATILS recommends issuing a proposed rule 5.7 for public comment. Such a rule would provide greater clarity about those duties and alleviate the obstacle of the uncertainty in the provision of nonlegal services. ATILS received a *Corporate Legal Market Report* finding, in part, that in the corporate sector legal work is being delivered in different ways, by both lawyers and nonlawyers, using new tools, and, in many cases, the work is being provided by entities beyond the scope of traditional lawyer regulation. The *Corporate*

### **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.

### Rule 1.1 Competence (Redline 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.](#)

~~[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.

## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Michael Young
City	Redlands
State	California
Email address	<a href="mailto:myoung@michaelyounglaw.com">myoung@michaelyounglaw.com</a>
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	<a href="mailto:whitten@dfis-law.com">whitten@dfis-law.com</a>
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>

## Public Comment - Proposed Rule 1.1 Cmt 6

Name	Mark A Lester
City	Camarillo
State	California
Email address	<a href="mailto:mark@venturaestatelegal.com">mark@venturaestatelegal.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose



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

I oppose the ATILS proposal to amend Rule 1.1.

My reasons are:

1. At this difficult time for all policy makers, the State Bar should postpone consideration of these significant changes which do not require urgent attention.

2. The State Bar should immediately focus its best energies on the impending enormous shortfall in funding for the courts, since the state will surely have the worst budget crunch in at least a decade. This will inevitably mean tighter budgets for the courts.

The Los Angeles County Bar Association's own programs, as well as dozens of others around the state, have demonstrated that, in good times and bad, the best way to increase most legal services needed by the middle and lower classes (e.g., family law, conservatorships and guardianships, bankruptcy, etc.) is through programs that facilitate the public's use of court processes.

3. In particular, the proposed change to Rule 1.1 adds a Comment stating that the duty of professional competence includes keeping abreast of technology that is employed in law practice. I am concerned that the amendment would hand a vague, hard to define, and potentially dangerous tool to State Bar prosecutors. This seems to be a solution in search of a problem.

Thank you for considering my opposition.

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## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	James Gorton
City	Pasadena
State	California
Email address	<a href="mailto:jgorton@gjpatorneys.com">jgorton@gjpatorneys.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

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

1. Pressing forward with radical changes to the notion of what is required as to attorney competence in the midst of a global health pandemic which is killing people in their hundreds of thousands and the beginnings of a significant and potentially devastating recession is plainly not appropriate at this time. These proposals should be aired and considered in a time and an atmosphere in which they can be discussed by all affected Californians, not buried in the devastating and unprecedented events now overtaking us. It is inconceivable that the task force cannot understand their own insensitivity and recklessness in regard to pushing forward with these proposals now. Is true public comment and debate desired? Then these proposals should be shelved until the emergency is past.

2. Changes to the Rules as to technological competence are far too vague and open to abusive enforcement. What is needed is specific guidance in each area of technology if this 'reform' is to be adopted. Further what constitutes the requisite level of competence should be specifically defined so that members of the Bar can know exactly what is expected of them. The rule should require the State Bar to develop a technological certification program to provide attorneys with a safe harbor certification of compliance. The proposed rule is additionally lacking in that it fails to consider the relative skill sets of attorneys, many of whom are skilled courtroom advocates but who may not personally be of a personality type which is able or comfortable with tech, but who nonetheless may employ persons to fill that need. Any rule to be adopted should recognize that technological competence may be satisfied by having adequate staff or independent contractor fulfillment.

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## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Galen Griep
City	Pasadena
State	California
Email address	<a href="mailto:estateplanners@aol.com">estateplanners@aol.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

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

I oppose the ATILS proposal to amend Rule 1.1.

My reasons are:

1. At this difficult time for all policy makers, the State Bar should postpone consideration of these significant changes which do not require urgent attention.

2. The State Bar should immediately focus its best energies on the impending enormous shortfall in funding for the courts, since the state will surely have the worst budget crunch in at least a decade. This will inevitably mean tighter budgets for the courts.

The Los Angeles County Bar Association's own programs, as well as dozens of others around the state, have demonstrated that, in good times and bad, the best way to increase most legal services needed by the middle and lower classes (e.g., family law, conservatorships and guardianships, bankruptcy, etc.) is through programs that facilitate the public's use of court processes.

3. In particular, the proposed change to Rule 1.1 adds a Comment stating that the duty of professional competence includes keeping abreast of technology that is employed in law practice. I am concerned that the amendment would hand a vague, hard to define, and potentially dangerous tool to State Bar prosecutors. This seems to be a solution

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in search of a problem.

Thank you for considering my  
opposition.

I oppose the ATILS proposal to amend Rule  
5.4.

My reasons are:

1. At this difficult time for all  
policy makers, the State Bar should postpone  
consideration of these significant changes  
which do not require urgent attention.

2. The State Bar should  
immediately focus its best energies on the  
impending enormous shortfall in funding for  
the courts, since the state will surely have the  
worst budget crunch in at least a decade. This  
will inevitably mean tighter budgets for the  
courts.

The Los Angeles County Bar  
Association's own programs, as well as  
dozens of others around the state, have  
demonstrated that, in good times and bad, the  
best way to increase most legal services  
needed by the middle and lower classes (e.g.,  
family law, conservatorships and  
guardianships, bankruptcy, etc.) is through

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programs that facilitate the public's use of court processes.

3. In particular, with respect to the proposal to change Rule 5.4 to allow lawyers to share fees with nonprofits, there is a clear upside but also risk. Although many nonprofits provide legal services to the underserved, it is also so easy to become a nonprofit that virtually anyone can become a non-profit. Moreover, there is already very little enforcement of the rule barring 501(c)(3)'s from involvement in political causes. This relaxation could exacerbate these problems.

Thank you for considering my opposition.

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## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Mina Sirkin
City	Woodland Hills
State	California
Email address	<a href="mailto:minasirkin@gmail.com">minasirkin@gmail.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>This is a slippery slope. Technology is changing on a daily basis. As soon as a lawyer learns one thing, the tech system has changed. No industry is subjecting its members or licensees to discipline if they cannot keep up with the ever-changing technology. You can offer one unit of technology CLE, but I think the rule is too risky for lawyers, especially those above 50 years old. It prejudices good older attorneys and subjects them to unnecessary discipline.</p>



## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	EFRAIN O GONZALEZ
City	COVINA
State	California
Email address	<a href="mailto:gontraserv@aol.com">gontraserv@aol.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Attorneys like any other business needs to advertise their service, however is a misleading information when Law firms advertise the amount of money they were able to be awarded in any case. As you you know every case is different and the judgments are equally different.</p> <p>I am not an attorney, I am a consumer, and by the advertising to have collected millions for an car accident it is completely false. I believe that law firms should not advertise any amount of judgement because people will think that they will received that amount of money.</p> <p>Stop the misinformation.</p> <p>Efrain Gonzalez</p>

## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	California Commission on Access to Justice
Name	Jasmine Kaddoura
City	Oakland
State	California
Email address	<a href="mailto:jkaddoura@calatj.org">jkaddoura@calatj.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<a href="#">CCAJ_Comment_Rule_1.1.pdf (192k)</a>

# CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

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May 12, 2020

The State Bar Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Support for the Proposed Amendment to California Rule of Professional  
Conduct 1.1 (Competence)

Dear Members of the Board of Trustees:

The California Commission on Access to Justice submits this comment to the State Bar Board of Trustees in support of the proposed amendment to California Rule of Professional Conduct 1.1 (Competence).

For 23 years, the Access Commission has worked to advance access to justice for all Californians using broad-based strategies informed by diverse stakeholders. The Access Commission proposes innovative solutions and oversees efforts to increase resources and improve methods of helping the poor, those of moderate-income, and others facing legal problems that they have no way to address and legal rights they have no way to realize.

Although Rule 1.1 addresses only a lawyer's responsibility for his or her own professional competence, nevertheless it may have access to justice implications—particularly as technology increasingly impacts the practice of law.

The increasing role of technology is not surprising given that technology has permeated almost every aspect of our personal and professional lives. Technology often is identified as a source of convenience, savings, and efficiency and its use has become prevalent in the profession. Thus, it makes sense to add proposed comment [1] to Rule 1.1, clarifying that “The duties set forth in this rule include the duty to keep abreast of the change in the law and its practice, including the benefits and risks associated with relevant technology.” This also is consistent with comment [8] to ABA Model Rule 1.1, which similarly addresses competence in connection with changing technology.

In addition to the increasing importance of technology generally, over the last number of years, there has been increasing awareness of and innovation related to the use of technology in addressing the needs of low- and moderate-income litigants and in increasing access to the courts. For example, legal aid organizations and courts have made significant advances in the use of websites, interactive resources, remote assistance, document assembly, e-filing,

## CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

e-service, online access to court records, electronic discovery, electronic recording, electronic calendars, social media, mobile devices, online learning, and other technology innovations for the delivery of legal services to low-income people and self-represented litigants.

In many ways, the practice of law, including aspects of access to justice and our daily lives, is transforming from an in-person, paper-based system to an electronic, technology-based realm. Lawyers, legal aid organizations and courts need to understand the benefits and risks associated with the use of technology to advance access to the courts. One clear example, during the current health crisis, is the Judicial Council's Emergency Rule 3, providing for court proceedings to be conducted remotely using technology.

Other examples — such as electronic filing systems in state and federal courts, online legal research, document assembly software used in transactional practice, and eDiscovery practices and procedures — demonstrate the necessity for lawyers to keep informed about technology in order to perform important aspects of their job today. The proposed comment may provide incentive to lawyers to adopt and incorporate useful technology into their practices, help lawyers appreciate the increasing role that technology plays in the practice of law, and lead to increased technology competence in the legal profession. The comment may be helpful in enhancing the delivery of legal services through the use of technology.

While the Access Commission does not view the proposed amendment to California Rule of Professional Conduct 1.1 as directly meaningful in the fight to address unmet legal needs, generally, increased incentives for the understanding and use of technology in the legal profession may be helpful in long-term efforts to reduce resistance to change and in encouraging positive acceptance of technology and innovation by all justice stakeholders in addressing the justice gap.

The California Commission on Access to Justice supports the proposed amendment to California Rule of Professional Conduct 1.1 (Competence), and encourages the State Bar to continue to look for ways to highlight and address the needs of low- and moderate-income people who participate in the justice system including through technology and innovation.

Sincerely,



Judge Mark A. Juhas  
Chair

cc: Donna S. Hershkowitz  
Interim Executive Director

## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	Orange County Bar Association
Name	Sarah Ireland
City	Newport Beach
State	California
Email address	<a href="mailto:sireland@ocbar.org">sireland@ocbar.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

May 14, 2020



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180 Howard Street  
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**Re: Proposed Amendment to California Rules of Professional  
Conduct Rule 1.1**

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning the Proposed Amendment to California Rules of Professional Conduct, Rule 1.1.

Founded over 100 Years ago, the OCBA has over 9,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political leanings, has approved these comments prepared by the Professionalism and Ethics Committee.

We believe that the addition of the proposed comment provides valuable guidance. At the same time, we have comments and suggestions that we believe could clarify, strengthen and improve the proposed comment and provide even more clarity for practitioners.

Overall, there was substantial discussion within our Committee relating to whether a lawyer, as a result of the new comment, would be responsible for keeping abreast of all changes in the law and its practice or just those changes which are relevant to the lawyer's practice. The same discussion was held relating to a lawyer keeping abreast of the benefits and risks associated with relevant technology. By way of example, we do not believe that the proposed comment is meant to require a lawyer practicing business litigation to stay abreast of the changes in family law or child support programs used to compute such obligations. However, as written, the comment could be read to imply such an obligation.

To provide clarity, we suggest adding the word "relevant" between the words "the" and "changes". We also suggest adding ", as applicable to the particular lawyer's practice" at the end of the comment following the word "technology". In sum, we would suggest that the proposed comment be revised to state:

"The duties set forth in this rule include the duty to keep abreast of the relevant changes in the law and its practice, including the benefits and risks associated with relevant technology, as applicable to the particular lawyer's practice."

Re: Proposed Amendment to California Rules of Professional Conduct, Rule 1.1

May 14, 2020

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These revisions would clarify for practitioners that the comment requires that a lawyer remain abreast of all changes in the law and technology only as applicable to his/her practice.

Thank you for your consideration of our comments and suggestions.

Sincerely,

Orange County Bar Association

A handwritten signature in black ink, appearing to read "S.B. Garner", with a long horizontal flourish extending to the right.

Scott B. Garner  
2020 President



## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	The Legal Aid Association of California
Name	Zach Newman
City	Oakland
State	California
Email address	<a href="mailto:znewman@laaonline.org">znewman@laaonline.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<a href="#">LAAC_Rule_1.1_Support_Letter.pdf (219k)</a>



*“The Unified Voice of Legal Services”*



May 15, 2020

Standing Committee on Professional Responsibility and Conduct  
State Bar of California  
180 Howard St.  
San Francisco, CA 94105

**Re: Proposed Amended California Rule of Professional Conduct 1.1 (Competence)—  
SUPPORT**

To the Standing Committee on Professional Responsibility and Conduct,

I am writing on behalf of the Legal Aid Association of California (LAAC) to express our **support** for the proposed amended California Rule of Professional Conduct (RPC) 1.1 (Competence).

LAAC is a statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California’s unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice.

LAAC has followed the Task Force on Access Through Innovation of Legal Services (ATILS) from the beginning. ATILS represented the intention of the State Bar of California to ensure that the legal community does not unnecessarily hinder increasing access to justice through outdated regulatory models that impede innovation. ATILS proposed a number of ideas, some simple and easy fixes, others more system-wide and transformative. While only two complete recommendations were released for public comment—this proposed change of RPC 5.4 as well as RPC 1.1—we would like to commend the Bar for launching this task force, and for the Bar’s support of this and other access to justice initiatives, now and into the future.

In light of this, we view the proposed change to RPC 1.1 as positive. Specifically, this change 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. In essence, by recognizing that a lawyer should be “familiar with” and “competent in using” technology, the Comment will “alert lawyers to that duty and should provide them with an incentive to adopt and incorporate useful technology in their

practices.”<sup>1</sup> The ultimate intent is to ensure that lawyers use all of the tools at their disposal to efficiently and effectively represent their clients, and technology is ever-more important in this regard. ATILS notes that this rule is similar to the Comment provided by the American Bar Association in Model Rule 1.1, which also acknowledges the role of technology in maintaining competence.<sup>2</sup> The State Bar has adopted non-binding ethics opinions on this matter in the past.<sup>3</sup>

While this rule change does not have an absolutely direct relationship to the justice gap in California, it expands a culture of knowledge and utilization of technology in the legal community, which has implications system-wide. Legal technology is increasingly imperative in moving from a one-to-one model of legal services to a one-to-many version, wherein more clients can be served, with quality maintained. For the legal community in general, it presents a commitment to understanding and considering use of technologies that have the potential to serve all clients—including low- and moderate-income clients—as efficaciously as possible. While this Comment goes beyond legal aid lawyers, it ensures legal aid attorneys also stay up on technological tools that they and their organizations can use in increasing access to justice.

In sum, LAAC has followed the efforts of ATILS from the start. Our objective has been to ensure that ATILS lives up to its objective of using technology to increase access. Changing RPC 1.1 presents one small step forward in this regard. Changing our legal culture is pivotal, and adding a Comment to the competence rule initiates such a change.

**We support this change to RPC 1.1.** Thank you again for this opportunity to comment. Please do not hesitate to reach out to me with questions or comments.

Sincerely,



Salena Copeland  
Executive Director, The Legal Aid Association of California

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<sup>1</sup> *Id.*

<sup>2</sup> REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025644.pdf>.

<sup>3</sup> *Id.*

## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Bar Association
Name	Brandon N. Krueger
City	Los Angeles
State	California
Email address	<a href="mailto:bkrueger@sallspencer.com">bkrueger@sallspencer.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<a href="#">LACBA_PREC_Comment_re_RPC_1.1.pdf (198k)</a>



**Los Angeles County Bar Association**

1055 West 7th Street, Suite 2700 | Los Angeles, CA 90017-2553

Telephone: 213.627.2727 | [www.lacba.org](http://www.lacba.org)

May 15, 2020

State Bar of California  
180 Howard St.  
San Francisco, CA 94105

Re: Rule of Professional Conduct 1.1

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee opposes proposed Comment [1] to rule 1.1 as unnecessary and inappropriate. If proposed Comment [1] is adopted, it should be revised to state the following:

[1] Under paragraph (b), learning and skill necessary for the performance of a legal service includes keeping abreast of changes in the law and the benefits and risks associated with relevant technology applicable to such service.

Rule 1.1 states two basic duties. In rule 1.1(a), a lawyer's duty is to not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal service with competence. In rule 1.1(c), if a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer must (i) acquire the learning and skill before performance of the legal service is required, (ii) associate or consult with another lawyer whom the lawyer reasonably believes is competent, or (iii) refer the matter to another lawyer.

Proposed Comment [1] is unclear and will produce unnecessary confusion if adopted. Proposed Comment [1] states:

[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.

The Committee is aware that proposed Comment [1] is adapted from the Discussion to former rule 3-110. The former rule Discussion states that a member's duty under the former rule included the supervision of subordinate lawyers and non-attorney employees and agents. The former rule Discussion concerned a member's duty to supervise compliance with two basic duties in Rule 3-110, which are carried forward in Rule 1.1(a) and 1.1(c)

The formulation of the Discussion in Rule 3-110 is not appropriate for proposed Comment [1]. Proposed Comment [1] concerns what is encompassed within the meaning of competence. Rule 1.1(b) defines competence as meaning “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably\* necessary for the performance of such service.” Proposed Comment [1] refers to the learning and skill element of competence in rule 1.1(b). However, proposed Comment [1] is based on a former rule Discussion that concerned the performance of the duties now found in rule 1.1(a) and 1.1(c).

Using the old Discussion language in proposed Comment [1] communicates that a lawyer has a duty to keep abreast of changes in the law and “relevant” technology independent of the performance of legal services. That duty is difficult to reconcile with the rule 1.1(a) duty to not fail perform legal services with competence, unless one recognizes that proposed Comment [1] concerns the learning and skill element of competence. Some may argue that proposed Comment [1] states a duty that is not tied to the performance of legal services, which would then raise other issues. Disconnected from the performance of legal services, there is no clear reference to what would be “relevant” technology in proposed Comment [1]. Of course, interpreting the Comment to expand the rule would be inconsistent with rule 1.0(c); but that may not be apparent to a lawyer not steeped in the rules, when that lawyer reads proposed Comment [1].

For these reasons, proposed Comment [1] does not provide clear guidance. The lack of clarity is resolved if proposed Comment [1] is linked to the learning and skill element in rule 1.1(b), which is accomplished in the version of Comment [1] the Committee proposes

Overall, however, the Committee believes that proposed Comment [1] is an unnecessary practice pointer that is not appropriate for a Comment. In its September 19, 2014 letter to the State Bar, which lead to the formation of the Second Commission for the Revision of the California Rules of Professional Conduct, the Court stated that the California Rules of Professional Conduct should stand on their own and “[c]omments to the proposed rules should be used sparingly and only to elucidate and not expand upon the rules themselves.”

As a result, the Second Commission, while emulating the ABA Model Rules in many ways, stripped out Model Rule Comments that were inconsistent with the Supreme Court’s direction. This includes Comment [8] in Model Rule 1.1, which states, “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.”

Model Rule 1.1 Comment [8] is not included in current rule 1.1 because it is not a needed explanation of the words of the corresponding rule. Like Model Rule 1.1 Comment [8], proposed Comment [1] to rule 1.1 is correct in that it would be advisable to pay attention to legal developments and relevant technology, but it is not an appropriate Comment because it does not elucidate the meaning of the language in the rule 1.1. Proposed Comment [1] would be even more inappropriate if it seeks to expand the current rule.

The rationale for proposed Comment [1] in the March 12, 2020 report to the Board of Trustees, underscores the advisory purpose of the Comment. It states:

Adding a comment to the competence rule that recognizes a lawyer's responsibility to be familiar with, and be competent in using, relevant technology will alert lawyers to that duty and should provide them with an incentive to adopt and incorporate useful technology in their practices. Such adoptions of relevant technology could have a beneficial effect on a law practice's efficiency, which can in turn lead to savings that can be passed on to clients.

Not only is proposed Comment [1] advisory, but it seeks to produce an outcome that cannot be achieved through rule 1.1. Rule 1.1 does not concern whether lawyers adopt useful or cost saving technology. It concerns whether a lawyer has the learning, skill and ability necessary to perform a legal service. For example, a lawyer who wins a client's case in the courtroom, but used no technology whatsoever, would not violate rule 1.1, even if the lawyer might have been able to obtain the same result more efficiently or at less cost if the lawyer had employed technology to obtain that outcome. It is unlikely that the proposed Comment will produce the outcome for which it is proffered, unless technological knowledge becomes necessary to perform a particular legal service. When technology rises to that level, it will result from the demands of the legal service, rather than from proposed Comment [1].

For these reasons, the Committee believes that proposed Comment [1] to rule 1.1 should not be adopted. It is advisory and seeks to promote an outcome that cannot be achieved through rule 1.1, except in circumstances where it would be achieved without the Comment. If proposed Comment [1] is adopted, the Committee requests that it be revised as the Committee proposes.

Sincerely,

A handwritten signature in black ink, consisting of a stylized capital 'B' followed by a long, horizontal, slightly wavy line extending to the right.

Brandon Niles Krueger  
Chair  
Professional Responsibility and Ethics Committee,  
Los Angeles County Bar Association

## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association Ethics Committee
Name	David Majchrzak
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State	California
Email address	<a href="mailto:DMajchrzak@Klinedinstlaw.com">DMajchrzak@Klinedinstlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<a href="#">ethics_committee_comments_RPC_1.1.pdf (201k)</a>

May 15, 2020

Board of Trustees  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Proposed Amended California Rule of Professional Conduct 1.1

Dear Trustees:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing the proposed amendment to Rule of Professional Conduct 1.1. Our committee was divided on its views of the proposed amendment.

The amendment would add a comment that resembles existing Comment 8 to ABA Model Rule 1.1. But the proposed new comment differs in that Comment 8 provides one way to address learning and skill, whereas proposed Comment 1 mandates a "duty" without qualification.

As a preliminary matter, when considering a comment to the rule, we should keep in mind the directive provided for in advance of its drafting. In its September 19, 2014 letter to Senator Joseph Dunn regarding the establishment of the 2014 Rules Revision Commission, the Supreme Court of California provided, "Comments to the proposed rule should be used sparingly and only to elucidate and not to expand upon the rules themselves."

Given this charge, it may be reasonable to conclude that the commission omitted an analogue to comment 8 because it was unnecessary to repeat what was already included in subparagraph (c): that one way that a lawyer can be competent is to "acquir[e] sufficient learning and skill before performance is required." Whereas no member of the Ethics Committee opposed an inclusion of the concept set forth in proposed Comment 1, the Committee was divided on whether the proposed comment was aligned with the other aspect of the Court's direction, to wit, whether the comment merely elucidated the rule, rather than expanded upon it.

At its heart, Rule 1.1 provides, among other things, that lawyers may not intentionally, recklessly, with gross negligence, or repeatedly fail to provide legal



services without application of the learning and skill and the mental, emotional, and physical ability reasonably necessary for the performance, whether personally or through another lawyer that is associated into the representation or the client is referred to. It does not within the language of the rule expressly provide for “a **duty** to keep abreast of the changes in the law and its practice.” Indeed, the rule provides that lawyers are competent when they have somebody else who the lawyers reasonably believe is competent assist the client.

A portion of the committee felt that the differences in the phrasing of proposed Comment 1 and Comment 8 of Model Rule 1.1 are significant. They view the ABA version as conditional and normative, recognizing the alternative options to satisfy competency within the rule; whereas the proposed amendment is unconditional and mandatory. That is, the ABA suggests that one way of fulfilling the duty of competency may be to stay abreast of changes. It allows for other practical options that may not be expressly stated in the rule, such as, for example, relying on competent members of an IT department for technological issues.

The proposed comment states, without qualification,<sup>1</sup> that it is mandatory for the lawyers to stay abreast the changes of the law and its practice. A portion of the committee felt this contradicts the rule itself, which provides, among other things, that the duty of competency may be met by other means, such as associating with, consulting with, or referring to another lawyer whom the lawyer believes is competent.

Another portion believes the distinction being drawn does not exist. Rather, Model Rule Comment 8 is unconditional and mandatory in that, whereas it does not use the word “duty,” as proposed Comment 1 does, Model Rule Comment 8 makes clear that the duty of competence as set forth in the rule includes the duty to “keep abreast of changes in the law and practice, including the benefits and risks of technology.” This segment believes that proposed Comment 1 is perhaps a more clear way of stating that than the ABA comment. And it believes that concerns that proposed Comment 1 may be overstated are addressed by the fact that these are intended to be rules of reason. So, they could not be interpreted as requiring lawyers to personally stay abreast of changes in the law or its practice when lawyers reasonably rely on others, such as IT professionals, or when, pursuant to subparagraph (c), a lawyer either associates with, professionally consults with, or refers the matter to another lawyer whom the lawyer reasonably believes to be competent.

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<sup>1</sup> We note that proposed Comment 1 expressly refers to “the duties set forth in this rule” without identifying which duties. This also potentially leads to a broader reading of the comment that could be addressed by expressly limiting it to “the duties to have sufficient learning and skill or to acquire sufficient learning and skill.”

The Committee recommends considering whether an amendment is necessary to add understanding and, if it is, to consider the above when deciding whether to use language more closely mirroring from ABA Model Rule 1.1, comment 8, rather than the proposed language, such as “To maintain or acquire the requisite learning and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” The committee appreciates the opportunity to comment on the proposed rule and invites further discussion if the Board has any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Majchrzak", written in a cursive style.

David Majchrzak

Co-Chair

California Lawyers Association Ethics  
Committee

## Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	San Diego County Bar Association
Name	Steven Berenson
City	San Diego
State	California
Email address	<a href="mailto:sberenson@klinedinstlaw.com">sberenson@klinedinstlaw.com</a>
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>The San Diego County Bar Association believes that further elaboration on lawyers' duty to keep up with relevant technology is appropriate. We recommend adding a second sentence to comment [1] as follows:</p> <p>The duties set forth in this rule include the duty to keep abreast of relevant changes in the law and its practice, including the benefits and risks associated with relevant technology, before performance is required. A lawyer may satisfy this duty by acquiring sufficient learning and skill or by associating with a professional whom the lawyer reasonably believes to be competent.</p>