



The State Bar of California

Rule 1.1 Competence

(Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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] 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.

**NEW RULE OF PROFESSIONAL CONDUCT 1.1
(Former Rule 3-110)
Competence**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-110 (Failing to Act Competently) in accordance with the Commission Charter, including consideration of the national standard of the ABA counterpart, Model Rule 1.1 (Competence). The result of the Commission’s evaluation is proposed rule 1.1 (Competence).

Rule As Issued For 90-day Public Comment

The main issue considered when drafting proposed rule 1.1 was whether the rule should be revised to delete the longstanding California standard prohibiting intentional, reckless or repeated acts of incompetence in order to substitute a standard like Model Rule 1.1 which states affirmatively that a lawyer must provide competent representation to a client. The Commission is recommending that the current California standard be retained as this is consistent with applicable Supreme Court precedent that has been repeatedly applied in State Bar Court disciplinary proceedings.

In *Lewis v. State Bar* (1981) 28 Cal.3d 683, the Supreme Court reaffirmed that a lawyer's single act of ordinary negligence does not suggest that the lawyer is unfit to practice law, and that the discipline system should not be burdened with conduct that is best addressed as a civil issue: “This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence.” In *In Matter of Torres* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149, the State Bar Review Department emphasized: “We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation.” It is important to note that under California’s approach a lawyer’s single act of gross negligence is not given a free pass. The Commission is recommending that paragraph (a) of the proposed rule be amended to include an explicit reference to gross negligence. In addition, gross negligence might also be regarded as an act constituting moral turpitude (See Business and Professions Code § 6106 and proposed rule 8.4).

Although the essential prohibition of the current rule is retained, proposed rule 1.1 includes three substantive changes. First, the concept of “diligence” as a component in the definition of competence has been deleted. The Commission is recommending a separate rule on a lawyer’s duty of diligence consistent with the approach used in most jurisdictions (see the executive summary of proposed rule 1.3 (Diligence)). A new comment in proposed rule 1.1, Comment [2], would cross reference rule 1.3 to alert lawyers to this change. A corresponding comment in proposed rule 1.3 cross references rule 1.1.

Second, in paragraph (c), in situations where a lawyer lacks sufficient learning and skill to handle a client’s case or matter, the Commission is recommending the addition of an option for the lawyer to refer a matter to another attorney whom the lawyer reasonably believes is competent.

Third, the Commission is recommending deletion of the existing Discussion paragraph that provides case citations addressing a lawyer’s supervision obligations. Rather than relying on case citations, the Commission is recommending three new separate rules on supervision (see

the executive summaries of proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistants). This is consistent with the approach to the duty of supervision in most jurisdictions.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 1.1 at its November 17, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018.

Rule ~~1.1~~ ~~3-110 Failing to Act Competently~~ Competence
(Redline Comparison to the California Rule Operative Until October 31, 2018)

- (Aa) A ~~member~~lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (Bb) For purposes of this rule, “competence” in any legal service shall mean to apply the ~~1) diligence, 2(i)~~ learning and skill, and ~~3(ii)~~ mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (Cc) If a ~~member~~lawyer does not have sufficient learning and skill when the legal ~~service is~~services are undertaken, the ~~member may~~lawyer nonetheless ~~perform such services competently~~may provide competent representation by ~~4(i)~~ associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, ~~or 2(ii) by~~ 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 ~~where~~if referral to, or association or consultation with, another lawyer would be impractical. ~~Even~~ Assistance in an emergency, ~~however, assistance should~~ must be limited to that reasonably* necessary in the circumstances.

Discussion Comment

~~The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)~~

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[2] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.