

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

**Lead Drafter:** Kehr  
**Co-Drafters:** Clopton, Kornberg, Peters, Rothschild  
**Meeting Date:** September 25-26, 2015

### I. CURRENT CALIFORNIA RULE

#### Rule 3-110 Failing to Act Competently

- (A) A member shall not intentionally, recklessly, 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 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

#### Discussion

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].)

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 referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

### II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation. This recommendation is to adopt as Rule 1.1 the substance of current rule 3-110, to not adopt any version of MR 1.3, but to adopt versions of MRs 5.1, 5.2, and 5.3.

### III. PROPOSED RULE (CLEAN)

#### Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

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- (b) For purposes of this Rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) 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 might provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) 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 consultation with another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances.<sup>1</sup>

### Comment

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

## IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-110)

### Rule ~~3-110~~1.1 ~~Failing to Act Competently~~Competence<sup>2</sup>

- (a) A lawyer shall not intentionally, recklessly, 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 1) diligence,  
2) learning and skill, and 3) 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 undertaking the legal services ~~is undertaken~~,<sup>3</sup> the lawyer ~~may~~ nonetheless ~~perform such services competently~~ might

<sup>1</sup> Paragraph (d) appears in almost the same wording as part of the *Discussion* to current rule 3-110. We propose moving it into the Rule because of the Supreme Court's expressed concern about Comments that contradict the Rule.

<sup>2</sup> We have not marked the minor changes made in moving to the ABA format such as changing “member” to “lawyer”.

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provide competent representation<sup>4</sup> by 1) associating with or, where appropriate, professionally consulting another lawyer ~~reasonably believed~~ whom the lawyer reasonably believes to be competent<sup>5</sup>, or 2) acquiring sufficient learning and skill before performance is required.

(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 consultation with another lawyer would be impractical. Assistance in an emergency 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].)<sup>6</sup>~~

~~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 referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably~~

<sup>3</sup> This is reordered from the passive to the active voice. Also, CRPC 3-110 is in the singular - "the legal service is" – the change to plural makes paragraph (c) consistent with paragraph (a) so that both are plural.

<sup>4</sup> The current rule has the slightly wordier "may nonetheless perform such services competently". The proposed change is intended to make the language simpler and more direct. Also, this changes "may" to "can" based on ¶4.2 of the Guidelines for Drafting and Editing Court Rules.

<sup>5</sup> The current "another lawyer reasonably believed to be competent" was changed by the first Commission to "another lawyer whom the lawyer reasonably believes to be competent." There is substance to this change from the passive to the active voice in that it makes clear that the inquiry will be undertaken from the perspective of the lawyer making the consultation. We recommend making this change.

<sup>6</sup> The first paragraph of the *Discussion* to the current rule explains the duty of supervision. We recommend that this be moved to the 5-series Rules, as explained below. Note that these citations generally have nothing to do with competent representation. For example, *Trousil v. State Bar*, 38 Cal. 3d 337 (1985) involved a lawyer's failure to pay settlement funds to a client, *Palomo v. State Bar*, 36 Cal. 3d 785 (1984) involved a lawyer's failure to supervise an employee's handling of his client trust account, never having instructed her on trust account requirements and procedures, and never having examined either her records or the bank statements for any of the office accounts, and *Crane v. State Bar of California*, 30 Cal. 3d 117 (1981) involved a threat in violation of what now is rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges").

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~~necessary in the circumstances~~

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### V. PUBLIC COMMENTS SUMMARY

- Lisa Wilbur, May 4, 2015 (re: 3-110) Suggest competence rule specifically address cognitive impairment of aging lawyers.
- Stephen Gillers, June 9, 2015: (re: 5.1 and 5.3) Recommends adoption of the ABA model rules on the following topics: imputed conflicts and screening; special conflicts for government attorneys; multijurisdictional practice; sexual relations with clients; truthfulness in statements; and duty to supervise. Also recommends conforming to ABA conflicts rule for clarity.
- Scott Garner, COPRAC, June 16, 2015: (re: 5.1-5.3) Rules addressing supervisory obligations of lawyers which would put this obligation in the black letter rather than commentary.

### VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 9/2/2015:**

The current language of rule 3-110 should be retained. The rule is well understood and there is extensive case law interpreting it. Additionally, the rule and case law address the duty to supervise attorney staff and employees.

With regard to the use of computer technology, a lawyer's duty of competence includes a duty to understand the technology he or she uses in the practice of law. Rule 3-110 is intended to be a general rule. Whether an attorney's failure to know and understand modern technology violates the competence rule should be evaluated in the context of the facts of each particular case. The same rationale applies to a lawyer who outsources services.

- **MIKE NISPEROS, OCTC, 9/4/2001:**

**Proposed Rule 3-110. Failing to Act Competently**

OCTC's recommends adding to the definition of competent representation and making it clear that reasonable diligence and prompt representation are required by this rule. The discussion section clarifies the definition of the word "repeated."

OCTC proposes the following revisions:

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(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule “competence” in any legal service shall mean to apply 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service; 4) thoroughness, and 5) preparation reasonably necessary for the representation.

(C) A member shall act with reasonable diligence and promptness in representing a client. A member shall make reasonable efforts to expedite litigation consistent with the interests of the client.

~~(C)~~(D) A member shall not represent a client when the member does not have sufficient time, resources, or current learning and skill to perform the services. If a member does not have sufficient current learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with, or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient current learning and skill before performance is required.

Discussion:

...

As used in this rule the word repeated does not require that the conduct be repeated in a single client matter, but may be repeated conduct in the aggregate when several client matters are considered or taken together. As such, a repeated failure to perform legal services competently may occur when the member fails to do a certain act in connection with the representation of several or multiple clients. For example, it could constitute a repeated failure to perform legal services competently for a member to fail to file civil complaints on behalf of several or multiple clients prior to the expiration of the statute of limitations.

A member has the obligation to keep current in the law, to be diligent and act promptly on behalf of his or her client. An attorney must use his best efforts to accomplish with reasonable speed the purpose for which he was employed. (Butler v. State Bar (1986) 42 Cal.3d 323, 328.) A member should, therefore, not take a case if the member does not have the time, resources, or current learning and skill to perform the services properly, subject to the exceptions provided in the rule. (See In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684).

OCTC COMMENTS:

OCTC recommends some changes to the language of the rule and in the discussion. It is believed these recommendations do not change the law but, instead, state more precisely what the law is, as interpreted by the courts. However, there has been some difference of opinion among the judges as to whether a repeated failure to perform competently must occur within a

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single client matter in order to constitute a violation of the rule or may be the result from a failure to do the same act on behalf of separate clients. The proposed changes would make it clear that several acts involving separate clients may be taken together where appropriate to establish a violation of the rule.

- **Commenter Name, State Bar Court:** No comments received from State Bar Court.

### VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

#### Illinois Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The ABA State Adoption Chart for Model Rule 1.1, which is the direct counterpart to rule 3-110, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_1.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.pdf)
- 39 states have adopted Model Rule 1.1 verbatim (AL, AZ, AR, CO, CT, DE, FL, HI, ID, IL, IN, IA, KS, KY, ME, MD, MA, MN, MS, MO, MT, NV, NM, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, VA, WA, WV, WI, WY); 7 jurisdictions have adopted something substantially similar to 1.1 (AK, DC, GA, LA, NE, NY, NC); and 5 states have adopted a version of the rule that is substantially different to Model Rule 1.1 (CA, MI, NH, NJ, TX)

The ABA State Adoption Chart for Model Rule 1.3, which has no direct California counterpart, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf)
- 42 states have adopted Model Rule 1.3 verbatim (AK, AZ, AR, CO, CT, DE, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY); 7 jurisdictions have adopted something substantially similar to 1.3 (AL, DC, GA, MA, NY, OR, VA); and 1 state other than CA has adopted a version of the rule that is substantially different from Model Rule 1.3 (TX places its diligence requirement in its Rule 1.01 and has not adopted MR 1.3).

The ABA State Adoption Chart for Model Rules 5.1 – 5.3 are posted at (see details below):

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.authcheckdam.pdf)

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### VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Rejected (Pros and Cons):

1. Should the rule should be revised to delete the long-standing California standard that subjects a lawyer to professional discipline for intentional, reckless, or repeated acts of incompetence and instead subject lawyers to discipline for acts of simple negligence?
  - Pros: The essential argument in favor of adopting the ABA approach is that it would create greater national uniformity and widen the scope of discipline for lawyers' professional errors.
  - Cons: Examining the difference between the current California disciplinary standard for competence ("intentionally, recklessly, or repeatedly fail to perform legal services with competence") and the ABA MR standard ("A lawyer shall provide competent representation to a client.") raises fundamental questions about the nature of professional discipline and the manner in which the disciplinary rules should be written.

California's rationale for professional discipline is as follows: "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." *In re Kreamer*, 14 Cal. 3d 524 (1975). For additional discussion of the purpose of professional discipline, see Robert L. Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, Or Disciplinable Offense?*, 29 W. St. U. L. Rev. 235, 257-64 (2002). This applies in the context of competence.

A lawyer's single act of simple negligence should not be the basis for discipline because it does not imply that the lawyer is unfit to practice law or that permitting the lawyer to practice would present a danger to the public. However, a lawyer's repeated, reckless, or intentional lack of competence in providing legal services does rise to that level. A lawyer's garden variety error therefore should continue to be limited to its civil consequences and should be remedied only through the civil courts. The disciplinary system should not be burdened by claims against lawyers based on an isolated act of simple negligence and lawyers should not be threatened by such claims. See *In the Matter of Torres*, 4 Cal. State Bar Ct. Rptr. 138, 149 (Rev. Dept. 2000) where the State Bar Court states: "We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation." See also *In the Matter of Riley*, 3 Cal. State Bar Ct. Rptr. 91, 113 (Rev. Dept. 1994) and cases cited therein. Civil proceedings claiming common

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negligence should not be skewed by an allegation that the lawyer has violated a fiduciary standard or is a danger to the public, but the proposed Rule properly would be informative in civil proceedings in which it is claimed that a lawyer's conduct rose above common negligence and violated fiduciary standards. The MR standard is a prime example of an aspirational expression that should not be confused with a disciplinary standard.

In fact, the ABA aspirational standard has led some states to discipline for what appears to be simple negligence, and in other situations to use MR 1.1 in circumstances that suggest greater culpability. Stating a disciplinary rule in terms of best practices will result in unpredictable consequences and a lack of effective notice to lawyers and to disciplinary authorities. See 29 W. St. U. L. Rev. 235, at 262 n. 134-137.

There is an additional problem with MR 1.1 in that its second sentence is written so as to focus on a lawyer's possession of the components of competence rather than requiring the lawyer to use and apply legal knowledge, skill, and thoroughness in the performance of legal services. The wording of that sentence leaves open the possibility that MR 1.1 makes it possible for a lawyer to be disciplined (or threatened with professional discipline) simply for not having demonstrated the appropriate level of legal knowledge, skill, or preparation even though there was no malpractice and no client harm (compare this current rule 3-110(B), which more clearly is definitional of competence and not itself the basis for professional discipline). The MR wording creates a potential trap for a lawyer who performed competently, but provides no additional protection to the public. The ABA language is informative in telling lawyers they should develop knowledge and skill and be prepared, but the ABA Rule is not connected to the outcome of the lawyer's work. Compare this to the current and proposed California Rules, both of which say that a lawyer "shall ... apply ..." diligence, learning, etc.

Retaining California's current standard would be consistent with the Commissions' charter in avoiding aspirational standards, would avoid changes to California rules that now work well, and would avoid an indefinite standard that would lead to unpredictable disciplinary and civil consequences.

2. Lisa Wilbur, in public comment dated May 4, 2015 suggested specifically addressing the cognitive impairment of aging lawyers.
  - o Pros: None identified.
  - o Cons: We recognize that impairment due to aging is an important topic, but we are unable to identify any way in which impairment due to age differs from impairment having any other cause. We also cannot see how to address any specific sort of competence in a disciplinary Rule. In addition, we do not see any way to write a disciplinary standard that would provide meaningful protection against any particular cause of deficient performance, whether that be age, substance abuse, or anything else.
3. Should paragraph (c) be augmented by adding "*4) thoroughness, and 5) preparation reasonably necessary for the representation*" as recommended by OCTC in a letter

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dated 9/4/2001?

- Pros: This would be a fuller statement of what a lawyer should do in representing a client.
  - Cons: From the standpoint of providing information to lawyer, as would be done in a practice guide, it would be correct to say that thoroughness and preparation are important. However, we conclude that thoroughness and preparation already are covered sufficiently by proposed paragraph (b), which speak of the application of diligence, learning and skill, so that adding this additional language would make the Rule wordier but not more accurate.
4. Should we recommend adoption of any of the MRs' six Comments.
- Pros: None identified.
  - Cons: The Comments to MR 1.1 for the most part either are incorrect, conversational, expressions of good practices, or unneeded because included as part of the recommended Rule.
5. Should the standard of "recklessly" be augmented by the addition of "grossly negligent"? This addition was suggested by the law professors' March 3, 2004 letter?
- Pros: The implicit argument in favor of this addition is that it would broaden the scope of potential disciplinary conduct.
  - Cons: The current standards of intentional, reckless, and repeated are well-established and well-understood in California law and have been the subject of multiple Supreme Court opinions; there is no evidence that they fail to meet disciplinary needs. Moreover, the meaning of "reckless" is conduct so far wide of the mark as to permit the inference that the deficiency was intended, in other words, conduct so extreme as to make it unnecessary for OCTC to produce any direct evidence of an intent to harm the client. See, e.g., *Spindell v. State Bar of California*, 13 Cal. 3d 253, 260 (1975): "However, even if we accept petitioner's contention that he lacked knowledge of Mrs. Amey's attempts to communicate with him and that he did not deliberately intend to ignore her needs, his conduct in the instant case fully supports the Board's finding of a willful dereliction in the discharge of his professional duties to Mrs. Amey. Failure to communicate with, and inattention to the needs of, a client are proper grounds for discipline. (citations omitted) Petitioner's failure to communicate with his client despite her persistent efforts to speak with him and his delay in obtaining a dissolution of marriage demonstrate, in his own words, 'extreme neglect.'" Thus, the standard of recklessness is treated as the same as gross negligence. To the same effect is *Davis v. State Bar*, 33 Cal. 3d 231, 238 (1983): "[Petitioner's] usurpation of his client's decision can only be characterized as willful. If petitioner doubted either his client's credibility or the legitimacy of her claim, he should have questioned her closely and, if his doubts persisted, withdrawn from employment. (See Rules Prof. Conduct, rule 2-111(C)(1)(a).) Even if ignorant of the applicable professional standards, he is nonetheless culpable of gross negligence in his usurpation of his client's privilege and in his subsequent failure to represent her. We have previously noted that grossly negligent failure to represent a client warrants

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discipline. (See *Doyle v. State Bar* (1976) 15 Cal.3d 973, 978 [126 Cal.Rptr. 801, 544 P.2d 937].)”

6. Should Rule 1.1 address a lawyer’s responsibilities concerning the use of technology?<sup>7</sup>
  - Pros: On the recommendation of the ABA Ethics 20/20 Commission, MR 1.1, the ABA revised Comment [8] to state that maintaining competence includes knowledge of the “benefits and risks associated with relevant technology.” Public protection might be enhanced by lawyers avoiding violations that are caused by inadequate knowledge of technology.
  - Cons: Any obligation a lawyer might have to understand the technology used in or available for use in the practice of law does not differ in kind from anything else a lawyer needs to utilize in providing legal services and would be the equivalent in an earlier generation of singling out *Corpus Juris Secundum*. In addition, advisory ethics opinions in California address this topic and provide adequate guidance. See, for example, Cal. State Bar Formal Op. No. 2010-179 (discussing confidentiality and competence issues when using “cloud” systems for client information) and Cal. State Bar Formal Op. No. 2012-184 (discussing virtual law offices). Special reference to technology in the Rule would not change its meaning; special reference in a Comment, as does the ABA, does not explain the Rule.
7. Should Rule 1.1 address outsourcing or offshoring of legal services?<sup>8</sup>
  - Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA added new Comments [6] and [7] that address a lawyer retaining or contracting with “other lawyers outside the lawyer’s own firm.” In part, this guidance alerts lawyers to the fact that the “ethical environments” of the jurisdictions in which other lawyers work is an important consideration in ethical outsourcing. Including a similar advisement might lead to better decision making by lawyers who outsource legal services.
  - Cons: We can see nothing in this topic that would make the proposed Rule more complete. As a Comment, this topic would not explain the Rule but instead would provide practice guidance on the possible risks of using outside lawyers.
8. Should Rule 1.1 include a Comment explaining proposed paragraph (c)?
  - Pros: There is some merit to this suggestion because there are circumstances in which it is not practical for a lawyer to consult with others or otherwise obtain sufficient knowledge to handle novel matter. As an extreme example, a lawyer’s first criminal case should not be the prosecution or defense when the potential outcome is the death penalty.
  - Cons: We have concluded that the change from “may” to “might” makes a Comment

<sup>7</sup> MR Comment [8] 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.”

<sup>8</sup> MR Comment [6] discusses at some length the situation in which a lawyer retains or contracts with other lawyers.

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unnecessary. Paragraph (c) confirms that a lawyer's competence is not measured by what the lawyer knew previously but only by the quality of the lawyer's work for a client. The change to "might" makes clearer that the ability to research and consult is not proof that the lawyer's work turned out to be competent.

9. Should there be a Comment that explains what is meant by "repeatedly"?
  - Pros: None identified
  - Cons: The question of when a lawyer's errors are sufficiently numerous to rise to a disciplinary level is entirely contextual. We cannot recommend any discussion that would be helpful and reliable.
10. Should the definition of "competence" in Proposed Rule 1.1(b) recognize differences in legal resources, skills, and expectations may exist between different communities? This was a comment made the RRC-1 by CA State Bar Law Practice Management & Technology Section. We recommend against this novel suggestion. We are not aware of any evidence that resources vary by locale, and in fact in the age of the internet we believe the opposite to be true, and we do not believe there should be different and indefinite standards of competence for disciplinary purposes.
11. Should the concept of diligence be contained in the competence rule or stated separately?

### **Introduction:**

Current rule 3-110 implies an obligation to be timely because, for example, a lawyer is subject to professional discipline for repeated acts of malpractice that include missing statutorily or court-imposed deadlines for filings or other acts. This could occur in litigation, such as by missing statutes of limitation or discovery deadlines. This also could happen outside of litigation, such as by missing contractual required notices or non-judicial foreclosure deadlines.

While the MR logically implies that diligence is an element of competence, MR 1.3 separately states: "A lawyer shall act with reasonable diligence and promptness in representing a client." According to the ABA's comparison chart, each of the other 50 jurisdictions reviewed by the ABA (49 states plus D.C.) has adopted MR 1.3, generally with no change.

Although the MR is titled "Diligence", it requires both diligence and promptness. The MR Comments describe an even broader scope. In addition to diligence and promptness, the two requirements that presumably are intended as disciplinary standards, the Comments discuss:

(i) a limitation on zealousness (so that a lawyer is not obligated to press for every advantage or act offensively); (ii) an obligation to not abandon a client (with reference to the termination rule, CRPC 3-700/MR1.16); (iii) the need to make clear when a lawyer-client relationship has terminated; and (iv) the prudent step for sole practitioners of having a succession plan to cover the lawyer's death or disability.

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- Pros: The arguments in favor of adopting a version of ABA Rule 1.3 are that it provides an opportunity to highlight the importance of a lawyer's timeliness and national uniformity.
- Cons: There is good advice in MR 1.3 and in its Comments. As an example, Comment [3] begins: "Perhaps no professional shortcoming is more widely resented than procrastination." However, we conclude that the MR and its Comment amount only to advice, mostly about best practices and good client relations, and that they therefore should not be adopted as part of a Rule intended to serve as the basis for disciplinary proceedings. From a disciplinary standpoint, all that is needed is a rule that provides a basis for disciplining a lawyer whose tardiness causes client harm, and there already are two rules that serve that purpose. The first is proposed Rule 1.1. In addition, rule 3-700/1.16 states the only bases on which a lawyer may terminate a lawyer-client relationship, so that a lack of diligence amounting to client abandonment also can violate rule 3-700/1.16. See, e.g., *In the Matter of Doran*, 3 Cal. State Bar Ct. Rptr. 871, 1998 Calif. Op. LEXIS 6 (1998) (lawyer left a social security benefits hearing because he was "too upset" at a ruling to continue; the hearing went on in the lawyer's absence; the client's claim was denied; lawyer found to have violated rules 3-110 and 3-700) and *In the Matter of Aulakh*, 3 Cal. State Bar Ct. Rptr. 690, 1997 Calif. Op. LEXIS 190 (1997) (lawyer held to have violated rules 3-110 and 3-700 for failing to pursue appeal, leading to a default, after having filed a notice or appearance). Having a separate diligence rule would be redundant unless the Commission were to decide that a lawyer should be subject to professional discipline for tardiness that would not trigger discipline under proposed Rule 1.1 or 3-700/1.16; we believe a rule of that scope would go beyond any conduct that calls into question a lawyer's fitness to practice law, and that this would be true even if Rule 1.3 were revised to adopt the intentional, reckless, or repeated standard of Rule 1.1. Promptness and diligence should be retained where they are. The Restatement 3d of the Law Governing Lawyers, § 16, Reporter's Note to Comment *d* treats diligence as being a component of competence and not a separate duty, as does current rule 3-110, and we believe this is the best resolution.

### **B. Concepts Recommended (Pros and Cons):**

1. Change from the passive to the active voice the language in current paragraph (C) that a lawyer may consult with "another lawyer reasonably believed to be competent".
  - Pros: The use of the passive voice leaves open the question of from whose perspective the reasonable belief is measured. By changing this to "another lawyer whom the lawyer reasonably believes to be competent" it becomes certain that the Rule addresses the reasonable belief of the lawyer making the consultation and therefore would be measured by the facts and circumstances known to that lawyer. Also, the use of the active voice is preferred under § 2.3 of the Guidelines for Drafting and Editing Court Rules.
  - Cons: None identified.

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2. Adopt versions of MRs 5.1-5.3 rather than retaining the duty to supervise only as an element of the duty of competence.

### Rule 5.1 Introduction:

MR 5.1 states, among other things, a lawyer's duty to supervise other lawyers, and MR 5.3 extends this concept to the supervision of non-lawyer personnel. The first paragraph of the *Discussion* to current rule 3-110 cites to a long line of California disciplinary cases that stand for the proposition that a lawyer's duties "include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." The fact that lawyers are subject to discipline and have been disciplined for failing to supervise make it arguable that MRs 5.1 and 5.3 are not needed. Despite this, we recommend the adoption of versions of these two MRs (and of MR 5.2, which addresses a subordinate lawyer's duties). Our reasoning is as follows

- Pros:
  1. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in larger law firms is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?
  2. MRs 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm's procedures and practices are pertinent not just to competent representation but representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. MRs 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of CRPC 3-110.
  3. The broader application of MRs 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.
  4. Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except the requirement of competence. MR 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to MR 5.2, there appears to be no conflict between MR 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Adding a version of MR 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior

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lawyer to correct conduct and directions.

5. MRs 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. An example would be local counsel who reports to and is directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.
  6. Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, MR 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.
  7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.
- Cons: MR 5.1 has been criticized as being too vague. For example, the first Commission received a public comment letter dated October 19, 2006 from Michael D. Schwartz, Special Assistant District Attorney for the County of Ventura, supporting the adoption of paragraph (c) but objecting to paragraphs (a) and (b) by saying, among other things: "It is not clear to me what actions the managing or supervising attorneys would be required to undertake to ensure that the other attorneys in the firm obey the rules. Enacting an office policy that attorneys must follow the rule would be superfluous since, as licensed professionals, every attorney is already legally obligated to comply with the rules." We respectfully disagree with this criticism. *First*, while an individual lawyer might be disciplined or suffer civil consequences after the fact, material client protection would be provided by having Rules that impose duties on supervising lawyers, leading to greater compliance before the fact. *Second*, there are some duties that require firm-wide systems, such as the creation and enforcement of conflict checking policies in order to avoid conflicts of interest. Mr. Schwartz's letter addressed MR 5.1 but his comments and our reply apply equally to MR 5.3.
  - Recommendation: What follows are an unmarked version of each of our recommended Rules 5.1 – 5.3 followed by red-lined versions that compare to the first Commission's recommended version of the Rule. The first Commission's recommendations were nearly identical to the MRs:

The following is a clean version of proposed Rule 5.1:

### **Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**

- (a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.
- (b) Each lawyer having direct supervisory authority over another lawyer, whether or not

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a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.

- (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if: (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### **Comment**

*Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.*

[1] Paragraph (a) requires partners and lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities might not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, each lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.

[4] Paragraph (a) also requires managers to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).

*Paragraph (b) – Duties of Lawyer as Supervisor*

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

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### *Paragraph (c) – Responsibility for Another’s Lawyer’s Violation*

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A partner, manger, or supervisor must intervene to prevent avoidable consequences of misconduct if the lawyer knows that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.

[8] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these Rules.

[9] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).

The following is a redline comparison of proposed rule 5.1 to the previous Commission’s proposed rule 5.1:

### **Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**

- (a) ~~A~~Each partner in a law firm, and ~~a~~each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these Rules and the State Bar Act.
- (b) ~~A~~Each lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.<sup>9</sup>
- (c) A lawyer shall be responsible for another lawyer’s violation of these Rules and the State Bar Act if: (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved;<sup>10</sup> or (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority, in

<sup>9</sup> See Comment [8] and its footnotes.

<sup>10</sup> The underlined language is borrowed from Michigan, as discussed below.

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the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member of employee of the same law firm,<sup>11</sup> and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Comment

*Paragraph (a) – Duties Of Partners and Managers To Reasonably Assure Compliance with the Rules.*

~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0.1(c) for the definition of “law firm”.~~<sup>12</sup>

~~[2] Paragraph (a) requires partners and lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed, for example, to provide reasonable assurance that all lawyers in the law firm will comply with these Rules and the State Bar Act. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.~~<sup>13</sup>

~~[3] Paragraph (a) also applies to internal policies and procedures of a law firm that involve compensation and career development of lawyer in the law firm that may induce a violation of these Rules and the State Bar Act. See Rule 2.1 and Rule 8.4(a).~~<sup>14</sup>

~~[4] Whether particular measures or efforts satisfy the requirements of paragraph (a) may might depend upon the law firm’s structure and the nature of its practice, including the size of the law firm, whether it has more than one office location or practices in more than one jurisdiction, or whether the firm or its partners engage in any ancillary business.~~<sup>15</sup>

<sup>11</sup> See Comment [8] and its footnotes.

<sup>12</sup> The first sentence of Comment [1] to the MR and the first Commission’s version merely repeats the Rule and should be removed. The second sentence raises a drafting issue regarding the use of definitions and how readers will be alerted to the use of a term defined elsewhere. We recommend striking this sentence, but the Commission will need to decide the definition and cross-reference issues. Assuming there is a separate section for defined terms used in multiple Rules, one method for alerting the reader would be to place the defined term in italics.

<sup>13</sup> This Comment provides helpful explanation, and we recommend that it be retained with minor editing. Our suggested changes largely are intended to shorten the Comment by removing words that are quoted from the Rule.

<sup>14</sup> We do not see this explanation and these cross-references as being helpful in understanding the meaning or application of Rule 5.1. We recommend removing the entire Comment.

<sup>15</sup> It arguably goes without saying that there is no one single manner by which different law firms can comply with Rule 5.1. Nevertheless, we see no harm in retaining this Comment as written except that we have corrected the misuse of “may”.

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~~[5] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities, including lawyers with intermediate managerial responsibilities in a legal services organization, a law department or an enterprise or a governmental agency, may~~ might not be required to implement particular measures under paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. However, ~~such a~~ each lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this Rule.<sup>16</sup>

~~[6] Paragraph (a) also requires managers, including lawyers who are in charge of a public sector legal agency or the head of a legal department,~~ to make reasonable efforts to assure that other lawyers in the agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the ~~The~~ creation and implementation of reasonable guidelines relating to the assignment of cases and the distribution of workload among lawyers in ~~the a public sector legal~~ a public sector legal agency or other legal department. See, e.g., State Bar of California, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS (2006).<sup>17</sup>

~~[7] Paragraph (a) does not apply to lawyer who have only intermediate managerial responsibilities in public sector legal agencies and law department. See Comments [5] and [8].~~<sup>18</sup>

### *Paragraph (b) – Duties of Lawyer as Supervisor*

~~[8] Paragraph (b) applies to lawyers who have direct supervisory authority over the work of other lawyers whether or not the subordinate lawyers are members or employees of the law firm.~~<sup>19</sup> Paragraph (b) applies to all supervisory lawyers including lawyer who are not partners in a partnership or shareholders in a professional law corporation. Paragraph (b) applies to lawyers who have intermediate managerial responsibilities in public sector legal agencies and law departments.<sup>20</sup>

~~[9] A lawyer with supervisory responsibility over another lawyer has an obligation to~~

<sup>16</sup> The reference to legal services organization, etc. is not needed if, as did the first Commission, the term “law firm” is defined to include them.

<sup>17</sup> The change is from passive to active construction.

<sup>18</sup> This Comment is not found in the ABA version. We recommend that it be removed because governmental and law department lawyers would have the same obligation as private lawyers to bring Rule 5.1-type problems to the attention of those with greater authority within the organization.

<sup>19</sup> If this is intended – and I think that it should be – it arguably changes the meaning of the Rule and therefore should be moved to the Rule. Part of the Commission’s charter is to avoid Comments that contradict the Rule.

<sup>20</sup> The second and third sentences are redundant of the Rule and can be eliminated.

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~~make reasonable efforts to insure that the other lawyer complies with these Rules and the State Bar Act. Adequate supervision is particularly important when dealing with inexperienced lawyers.~~<sup>21</sup>

~~[405] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter.~~<sup>22</sup>

*Paragraph (c) – Responsibility for Another’s Lawyer’s Violation*

~~[11] Paragraph (c)(1) applies to any lawyer who orders or knowingly ratifies another lawyer’s conduct that violates these Rules and the State Bar Act.~~<sup>23</sup>

~~[126] Under paragraph (c)(2) a partner or other lawyer having comparable managerial authority in a law firm, and a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer, may be responsible for the conduct of the other lawyer, whether or not the other lawyer is a member or employee of the law firm. Appropriate. The appropriateness of remedial action under paragraph (c)(2) would depend on the immediacy of that lawyer’s involvement and the nature and seriousness of the misconduct and the nature and immediacy of its harm.~~<sup>24</sup> A partner, manager, or supervisor must intervene to prevent avoidable consequences of misconduct if the ~~supervisor~~ lawyer knows that the misconduct occurred. ~~Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension consistent with the lawyers’ duty not to disclose confidential information under Business and Professions Code section 6068, subdivision (e)(1).~~<sup>25</sup>

~~[137] A supervisory lawyer may violates~~ paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.<sup>26</sup>

<sup>21</sup> This merely repeats the Rule and can be eliminated.

<sup>22</sup> The first sentence of this Comment is correct, and we see no reason not to retain it. The second sentence is problematic because it assumes that it always will be clear who is “in charge of a particular client matter”. We therefore would retain the former and delete the latter.

<sup>23</sup> This Comment repeats the Rule without addition or explanation.

<sup>24</sup> It is not apparent why they immediacy of the supervisor’s involvement helps determine whether particular remedial action is appropriate. Our editing is intended to make the sentence declarative and more accurate.

<sup>25</sup> We recommend removing material that only duplicates what is in the Rule, reordering what remains into a declarative sentence, and simplifying by removing the litigation example. We also recommend removing the example of dual responsibility because it is covered by proposed Comment [9].

<sup>26</sup> The word “may” is permissive. See ¶4.2 of the Guidelines for Drafting and Editing Court Rules.

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[148] Paragraphs (a), (b) and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. The question of whether ~~Whether~~ a lawyer ~~may~~ can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.<sup>27</sup>

[159] This Rule does not alter the personal duty of each lawyer in a law firm to comply with the Rules of Professional Conduct. See Rule 5.2(a).<sup>28</sup>

### COMPARISON OF PROPOSED RULE 5.1 TO APPROACHES IN OTHER JURISDICTIONS (national backdrop):

- Alabama Rule 5.1(a) removes: “, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm,” – This is a tempting change, the effect of which would be to make every partner in a firm subject to professional discipline if the firm does not have effective measures in place. On balance, we recommend against this. The ABA's version of the Rule recognizes that by focusing on the partners who have the power to effect firm changes, it focuses on a relatively small group that can make it their business to find out how to run things properly, for example, by learning how to design and operate an effective conflicts checking system. This is organizationally reasonable and more likely to have the effect desired by the Rule.
- Alaska Rule 5.1(c)(2) adds the underlined language: “...the lawyer is a partner or together with others has comparable managerial authority ....” – we recommend against this change. The reference to managerial authority is important in 5.1(a) because it addresses the operation of the firm. On the other hand, Rule 5.1(c) is directed to individual action – correction of a subordinate's known Rule violation by a particular partner or direct supervisor. A firm partner or manager does not need to work with others to address a single subordinate lawyer's improper conduct.
- The D.C. Rule makes these changes:
  - 5.1(a) adds the underlined language: “... possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts .... that all lawyers in the firm or agency ....” – this change is unnecessary if “law firm” is defined to include governmental law departments, as the first Commission did in its proposed Rule 1.01(c). We recommend that we not make this change.
  - Rule 5.1(c)(2) changes the order of the sentence and adds another reference to government law departments. We recommend against both changes, the former as unhelpful and the latter as unnecessary.

<sup>27</sup> I have reordered this sentence into a declarative form and corrected the misuse of “may”.

<sup>28</sup> I see this as an informative cross-reference and recommend that it be retained.

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- Fl. Rule 5.1 includes titles for paragraph (a), (b), and (c) that add nothing. Fl. Rule 5.1(c)(1) makes a trivial change in language that is not worth the time to discuss.
- The Mass. Rule makes two changes:
  - Its 5.1(a) removes the “comparable managerial authority” as did Alabama. As previously explained, we do not support this modification.
  - Its 5.1(c)(2) also removes “or had comparable managerial authority”. We recommend against this change because there are situations in which senior associates or of counsel lawyer might have managerial authority and should comply with (c)(2).
- MI makes two changes:
  - Paragraphs (a) and (c)(2) remove the “comparable management authority” language as do the Alabama and Massachusetts versions.
  - Paragraph (c)(1) adds the underlined language: “...with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved;” This change recognizes that the supervisor’s knowledge of the conduct might not be meaningful to the supervisor without knowing the context in which the subordinate acted. This alteration seems right to us, and we recommend that its adoption.
- N.H. Rule 5.1(a) and (b) replaces “a” with “each”. For example, (a) begins: “Each partner ... and each lawyer ....” This does not change the substance of the MR but we think it more sharply and clearly says what the MR and the first Commission’s versions only imply. We recommend adopting this N.H. change.
- The N.J. version of Rule 5.1 makes multiple changes:
  - It removes from 5.1(a) the obligation of managers and makes it a duty of the firm. To the extent this makes sense (we don’t think it does), it reflects the fact that N.J. is one of only two states that discipline law firms. We do not recommend that adopting this variation because it makes even less sense in the 48 states plus D.C. that don’t discipline law firms.
  - It edits 5.1(c)(2) by removing the requirement of specific knowledge, thus potentially making a second lawyer responsible for the first lawyer’s misconduct by ratifying the first the conduct without specific knowledge of it. A lawyer might or might not be negligent in ratifying another lawyer’s conduct sight unseen, but we do not see the superior’s doing so as implicating the second lawyer’s fitness to practice. We do not recommend adopting this variation.
  - It adds 5.1(d) as follows: “(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm’s business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate

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or holds some other comparable status with the firm.” We are not aware of demonstrated need for a rule along those lines, and we do not recommend adopting this variation.

- NY is the other state that disciplines law firms, and it has removed the duty of firm managers along the lines of the NJ changes. It also has modified the personal liability standard that of paragraph (c) [paragraph (d) in the NY version] by adding that a managerial or supervisory lawyer has disciplinary liability for the conduct of a subordinate if “in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.” This seems to me to create a negligence standard, which I do not think is appropriate for professional discipline. We do not recommend adopting any of the NY variations.
- Ohio has adopted MR 5.1(c) without change but has omitted all of 5.1(a) and (b). For the reasons already explained, we favor adopting versions of paragraphs (a) and (b) and therefore do not recommend that we adopt Ohio’s variation.
- As Ohio has done, Oregon Rule 5.1 retains MR 5.1(c) but omits all of 5.1(a) and (b). This eliminates all of the organizational responsibilities that we see as a major reason for adopting a version of MR 5.1. We do not recommend adopting this variation.
- Texas has a complete rewrite that we do not think adds anything but subtracts quite a bit from the MR. We don’t recommend the Texas version because: (a) it omits the managers’ duty to have compliance systems in place and properly operating; and (b) it adds references to governmental agencies that is unneeded if the definition of law firm covers governmental agencies (and Texas covers this too narrowly by applying only to the general counsel and thus eliminates the managerial authority element of MR 5.1(c)(2)). It states in full:

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

  - (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
  - (b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

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The following is a clean version of proposed Rule 5.2:

### **Rule 5.2 Responsibilities of a Subordinate Lawyer**

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.<sup>29</sup>
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a of professional duty.<sup>30</sup>

### **Comment**

[1] A subordinate lawyer has no general obligation to supervise a supervising lawyer. For example, a subordinate who signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the State Bar Act unless the subordinate knows of the document's frivolous character.<sup>31</sup>

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.<sup>32</sup>

<sup>29</sup> The first Commission changed the ABA's "is bound by the Rules of Professional Conduct" to the more forceful "shall comply with" in order to emphasize the mandatory nature of the subordinate lawyer's obligations. We recommend retaining that change.

<sup>30</sup> As explained above, I would strike this one word as did Ohio and Utah.

<sup>31</sup> This editing is for simplicity and directness.

<sup>32</sup> This is the same in substance to the MR's Comment [2], but I think better stated. My main concern about the MR version is that its first sentence, if taken out of context, directly contradicts the Rule ("When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment.").

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Lead Drafter: Kehr

Co-Drafters: Clopton, Kornberg, Peters, Rothschild

Meeting Date: September 25-26, 2015

The following is a redline comparison of proposed rule 5.2 to the previous Commission's proposed rule 5.2:

### Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.<sup>33</sup>
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an ~~an~~ **arguable** question of professional duty.<sup>34</sup>

### Comment

[1] ~~The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act.~~<sup>35</sup> ~~Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acts at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules or the State Bar Act. See Rule 8.4(a)~~ **A subordinate lawyer has no general obligation to supervise a supervising lawyer.**

<sup>36</sup> For example, ~~if~~ a subordinate who signs a frivolous pleading at the direction of a supervisor, ~~the subordinate~~ would not violate the Rules or the State Bar Act unless the subordinate knows of the document's frivolous character.<sup>37</sup>

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the ~~arguable~~ question of

<sup>33</sup> The first Commission changed the ABA's "is bound by the Rules of Professional Conduct" to the more forceful "shall comply with" in order to emphasize the mandatory nature of the subordinate lawyer's obligations. We recommend retaining that change.

<sup>34</sup> As explained above, we recommend striking this one word as did Ohio and Utah.

<sup>35</sup> The first sentence of this Comment is not in the MR version and does nothing but restate paragraph (a). We view it as surplus and recommend that it be removed.

<sup>36</sup> This sentence seems not to explain anything in the Rule but instead to make a separate point, which is that the subordinate is not obligated to supervise the supervisor (except when they dispute an identified professional responsibility issue in which the supervisor certainly is wrong). We have edited with the hope of making that point.

<sup>37</sup> This editing is for simplicity and directness.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

**Lead Drafter: Kehr**

**Co-Drafters: Clopton, Kornberg, Peters, Rothschild**

**Meeting Date: September 25-26, 2015**

professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.<sup>38</sup>

### COMPARISON OF PROPOSED RULE 5.2 TO APPROACHES IN OTHER JURISDICTIONS (national backdrop):

Almost every state had adopted MR 5.2 verbatim. The variations are:

- Connecticut did not adopt paragraph (b). We view this paragraph as important in striking a balance between a subordinate lawyer's role as a lawyer and as a member of an organization. We recommend retaining paragraph (b).
- Virginia has not adopted MR 5.2. As previously discussed, we recommend rejecting this approach.
- Ohio and Utah have omitted "arguable" from paragraph (b): "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an ~~arguable~~ question of professional duty." The Ohio and Utah change make sense in that the only pertinent question is whether the supervisor has given reasonable directions to the subordinate. The question of whether there was an "arguable question" is illogical surplusage because the supervisor's resolution cannot be reasonable if inarguably incorrect. We recommend adopting the Ohio and Utah change to paragraph (b).
- There are some trivial changes that are not worth the time to discuss. For example, Florida has added titles to paragraphs (a) and (b), and Texas has stated them as a single unnumbered sentence.

The following is a clean version of proposed Rule 5.3:

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) each partner in a law firm, and a each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

<sup>38</sup> This is the same in substance to the MR's Comment [2]. Our main concern about the MR version is that its first sentence, if taken out of context, directly contradicts the Rule ("When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment.").

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

**Lead Drafter: Kehr**

**Co-Drafters: Clopton, Kornberg, Peters, Rothschild**

**Meeting Date: September 25-26, 2015**

- (b) each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:
  - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Comment

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *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 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

The following is a redline comparison of proposed rule 5.3 to the previous Commission's proposed rule 5.3:

### Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) ~~a~~each partner in a law firm, and ~~a~~each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;<sup>39</sup>

<sup>39</sup> These changes track those recommended for Rule 5.1.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

**Lead Drafter: Kehr**

**Co-Drafters: Clopton, Kornberg, Peters, Rothschild**

**Meeting Date: September 25-26, 2015**

- (b) ~~each~~ lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;<sup>40</sup> and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:
- (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved;<sup>41</sup> or
  - (2) the lawyer is a partner, or individually or together with other lawyers has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### Comment

~~[1] Lawyers often utilize nonlawyer personnel generally employ assistants in their practice,~~ including secretaries, investigators, law student interns, and paraprofessionals.<sup>42</sup> Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the all ethical aspects of their employment, ~~particularly regarding the obligation not to disclose confidential information relating to representation of the client<sup>43</sup>, and should be responsible for their work product.~~<sup>44</sup> See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [224 Cal.Rptr. 101]; *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 [177 Cal.Rptr. 670]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100

<sup>40</sup> This change also tracks the recommendation for Rule 5.1.

<sup>41</sup> The added language is borrowed from Michigan, as we have recommended with Rule 5.1 in which the same addition also appears.

<sup>42</sup> The phrase that introduces Rule 5.3 describes an obligation that is not limited to a law firm's employees. The first sentence of Comment [1] might be read as being in conflict with the Rule because "employ in their practice", which might be seen as being limited to employees within a law firm. Our recommended change is intended to avoid that misreading. Also, we recommend changing "assistants" to "nonlawyer personnel" in order to track the language of the Rule and avoid possible confusion.

<sup>43</sup> Out of concern that the single example to confidentiality might narrow a reader's vision, we have removed that example in order to broaden the Comment.

<sup>44</sup> It is hard to know what to make of "should" in this sentence. It might be read as meaning that lawyers are required to act as if they are responsible for the work product of nonlawyers, but that would go beyond the Rule in suggesting the lawyer is a guarantor of the conduct of the nonlawyer personnel. We don't see that this language adds any clarity to the Rule, and we therefore recommend that removing it.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

**Lead Drafter: Kehr**

**Co-Drafters: Clopton, Kornberg, Peters, Rothschild**

**Meeting Date: September 25-26, 2015**

Cal.Rptr. 713]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]. The measures employed in instructing and supervising nonlawyers should take account of the fact that they ~~may~~might not have legal training.<sup>45</sup>

~~[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules and the State Bar Act. See Comment [2] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.~~<sup>46</sup>

~~[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer.~~<sup>47</sup>

### **C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:**

Proposed Rule 1.1 and the recommendation to not adopt any version of MR 1.3 would not substantively change current rule 3-110. Proposed Rule 5.1 and 5.3 do not substantively change a lawyer's obligation to supervise, but they add responsibilities for those lawyers who control a law firm to create and enforce firm-wide policies, such as to check for possible conflicts of interest, in order to make it more likely that firms will institute policies that will prevent Rule violations by individual firm lawyers.

### **D. Non-Substantive Changes to the Current Rule:**

Proposed Rule 5.2 does not alter the fact that each lawyer is responsible for acting ethically but defines the balance between those responsibilities and a subordinate lawyer's organizational obligation to follow directions. Also, adding a Rule that expresses the subordinate lawyer's obligations should make it easier for a subordinate lawyer to influence the decisions of his or her supervisors.

### **E. Alternatives Considered:**

None.

<sup>45</sup> Another misuse of "may". I otherwise would retain this Comment, which is identical to the MR version except for the addition of citations to California case law.

<sup>46</sup> This Comment has no counterpart in the MR version, and it adds nothing to the Rule itself other than the unnecessary reference to government legal departments and legal service organizations. We recommend deleting it.

<sup>47</sup> This Comment simply repeats what is not paragraph (c). We recommend that deleting it.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

**Lead Drafter:** Kehr  
**Co-Drafters:** Clopton, Kornberg, Peters, Rothschild  
**Meeting Date:** September 25-26, 2015

### IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

None.

### X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

**Kehr**

- [Date]: Email Comment

**Clopton**

- [Date]: Email Comment

**Kornberg**

- [Date]: Email Comment

**Peters**

- [Date]: Email Comment

**Rothschild**

- [Date]: Email Comment

### XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

**Recommendation:**

[Adopt proposed amended rule 3-110. or No change to current rule.]

**Proposed Resolution:**

RESOLVED - #1: That the Commission adopts proposed amended Rule 1.1 in the form attached to this Report and Recommendation.

RESOLVED - #2: That the Commission not adopt any form of MR 1.3.

RESOLVED - #3: That the Commission adopts proposed amended Rule 5.1 in the form attached to this Report and Recommendation.

RESOLVED - #4: That the Commission adopts proposed amended Rule 5.2 in the form attached to this Report and Recommendation.

RESOLVED - #5: That the Commission adopts proposed amended Rule 5.3 in the form attached to this Report and Recommendation.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-110 [1.1]**

**Lead Drafter:** Kehr  
**Co-Drafters:** Clopton, Kornberg, Peters, Rothschild  
**Meeting Date:** September 25-26, 2015

**XII. DISSENTING POSITION(S)**

None.

**XIII. FINAL COMMISSION VOTE/ACTION**

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]



# THE STATE BAR OF CALIFORNIA

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Date: September 2, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for September 2015 meeting

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- I. Opening Comment
- II. Points for Consideration, as calendared
  - A. Rule 3-500: Communication
  - B. Rule 5-110 and Model Rule 3.8 [Special Responsibilities of a Prosecutor]
  - C. Rule 3-110: Failing to Act Competently [Model Rules 1.1, 1.3, 5.1, 5.2, and 5.3]
  - D. Rule 4-200: Fees for Legal Services [Model Rules 1.5]
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  - F. Rule 2-200: Financial Arrangements Among Lawyers [Model Rule 1.5(e)]
  - G. Rule 2-400: Prohibited Discriminatory Conduct in a Law Practice
- III. Closing Comment

### I.

#### OPENING COMMENT

The following comments address the rules to be considered at the Commission's September 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

**II.**  
**POINTS FOR CONSIDERATION**

**[TEXT OMITTED]**

**C. Rule 3-110: Failing to Act Competently [Model Rules 1.1, 1.3, 5.1, 5.2, and 5.3]**

The current language of rule 3-110 should be retained. The rule is well understood and there is extensive case law interpreting it. Additionally, the rule and case law address the duty to supervise attorney staff and employees.

With regard to the use of computer technology, a lawyer's duty of competence includes a duty to understand the technology he or she uses in the practice of law. Rule 3-110 is intended to be a general rule. Whether an attorney's failure to know and understand modern technology violates the competence rule should be evaluated in the context of the facts of each particular case. The same rationale applies to a lawyer who outsources services.

**[TEXT OMITTED]**

**III.**  
**CLOSING COMMENT**

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

**Initial Public Comments**  
**[Rule 3-110 – Failing to Act Competently]**

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-007	Wilbur, Lisa	No	3-110	Suggest competence rule specifically address cognitive impairment of aging lawyers.	
2015-048e	Law Professors	Yes	3-110 (1.1)	Concerned that rule does not adequately include the concept of diligence. Recommend adoption of a separate rule on diligence similar to MR 1.3.	
2015-048f	Law Professors	Yes	3-110 (1.3)	Recommend against inclusion of a comment that would exclude from the rule’s application a “single act of negligent conduct” or “single mistake” and would recommend adding “or with gross negligence” to the standard for competence. (See former proposed rule 1.1, Comment [6].) Concerned that rule does not adequately include the concept of diligence. Recommend adoption of a separate rule on diligence similar to MR 1.3.	



## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3-110

**From:** Lisa Wilbur

**Date:** May 4, 2015

**Re:** Rule 3-110

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Rule 3-110: Spell it out regarding cognitive impairment for aging lawyers. It is especially an issue in which a child is in practice with an aging parent lawyer.

**From:** Richard Zitrin, Multiple Law Professors

**Date:** March 3, 2015

**Re:** Rule 1.1

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This comment is closely connected to the next comment, on MR 1.3, Diligence.

The competence rule, as modified, gives an unfortunate and overly broad “free pass” to a lawyer committing any first act of negligence, or any first “mistake,” *no matter how egregious* that mistake may be. Section (a) of the rule remains unchanged: “A lawyer shall not *intentionally, recklessly, or repeatedly* fail to perform legal services with competence.” (Emphasis added.) However, Comment ¶ 6 has been added, explicitly stating that the rule is “not intended to apply to *a single act* of negligent conduct *or a single mistake* ....” (Emphasis added.)

This comment is seriously misguided. The comment is supported by the Commission's rules introduction, which claims that “most jurisdictions” apply the competence rule only to intentional, reckless, or repeated acts.” Evidence is to the contrary, however, as is the ABA rule. At best the Commission relies on an unsupported anecdotal statement.

Moreover, Comment ¶ 6 would forbid discipline even if the “single act” would meet a “gross negligence” standard. Use of the common non-legal word “mistake,” muddies the scope of 1.1 (a) and creates the possibility that *any* single mistake, however great, would fall outside the rule.

Fixing this rule is not difficult. First, we strongly recommend that this Board eliminate ¶ 6 of the Comment. At the very least, the Board should strike the words “or a single mistake” and add the word “simple” before “negligent conduct,” so that the comment would only excuse a first act of simple negligence.

Second, we recommend that the Board add the words “gross negligence” to 1.1 (a): “A lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence ....”

**From:** Richard Zitrin, Multiple Law Professors

**Date:** March 3, 2015

**Re:** Rule 1.3

---

Most unfortunately, the Commission also determined not to approve Rule 1.3 on diligence. The Commission's explanation, in its document updated May 17, 2010 entitled “Rules and Concepts that Were Considered, But Are Not Recommended for Adoption” (“*May 2010 Non-Adoption Summary*”)

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 3-110

argues that “diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence.” This is not so.

Although proposed Rule 1.1 pays lip service to the concept of diligence in subsection (b) and Comment ¶2, this is not close to adequately replacing the diligence rule. For instance, while proposed Comment ¶2 is similar to ABA Rule 1.3's Comment ¶1, other important components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work overload (ABA Rule 1.3, Comment ¶2), procrastination and delay (ABA Comment ¶3), and following through on matters to completion (ABA Comment ¶4).

We strongly agree with the Commission's minority report with respect to this rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: paying adequate attention. MR 1.3 and its comments need to be approved by the Board.

**CURRENT CALIFORNIA RULE 3-110**  
**“Failing to Act Competently”**

***I. Text of Current Rule:***

- (A) A member shall not intentionally, recklessly, 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 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

**Discussion**

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].)

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 referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

***II. Background/Purpose***

***A. Introduction***

As part of its rule 3-110 assignment, the Drafting Team has been tasked with considering several concepts that the ABA Model Rules treat in five separate rules but which California has addressed in a single rule, 3-110. Specifically, the Drafting Team is being asked to consider whether the Commission should recommend an approach similar to the Model Rules and treat the duties of competence and diligence, and the duties to supervise subordinate lawyers and nonlawyer assistants in separate rules. (Compare Model Rules 1.1, 1.3 and 5.1 to 5.3.) To assist the review, this section of the assignment memo is divided into several subsections: Subsection B. contains a history of current rule 1-110. Subsection C describes recent amendments to Model Rule 1.1 concerning (i) the outsourcing of legal services and (ii) technological competence.

Subsection D. contains a discussion of Model Rule 1.3 (diligence), including the first Commission's consideration and decision not to recommend that rule. Subsection E. contains a discussion of Model Rules 5.1 through 5.3 concerning a lawyer's duties to supervise, including recent amendments made to Model Rule 5.3 to address the outsourcing of legal *support* services.

## B. History of Rule 3-110 Failing to Act Competently

Current rule 3-110 originated in 1975 with former rule 6-101, which prohibited a lawyer from "willfully or habitually"<sup>1</sup> performing legal services "if the lawyer knows or reasonably should know" that the lawyer "does not possess the learning and skill ordinarily possessed by lawyers" who perform "similar services" in the "same or similar locality." (Rule 6-101(1)).

In a separate paragraph (2), former rule 6-101 also prohibited a lawyer from failing to "use reasonable diligence and his best judgment" in exercising his skill and learning "to accomplish, with reasonable speed, the purpose for which he was employed."

Rule 6-101 was amended in 1983 to state that a lawyer "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." The operative term "willfully" was replaced by "intentionally or with reckless disregard" to address concern that "willfully" is confused with the concept of a "willful breach" of the Rules under Business and Professions Code § 6077. The substitution avoided that confusion but preserved the meaning of the original language. (See Bates stamp page 00008 of "Memorandum In Support Of Request That Proposed Amendments To Rule 6-101, Rules Of Professional Conduct Of The State Bar Of California Be Approved By The Supreme Court Of California And Supporting Documents," August 11, 1983 ("1983 Memorandum").)

Another amendment in 1983 substituted "repeatedly" for "habitually." The word "repeatedly" was regarded as a more accurate description of the intended disciplinary standard.

The 1983 amendments also added a definition of competence. Rule 6-101(A)(1) provided that: "Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation." The language of the definition was intended to accomplish two objectives: (1) incorporate the concept of "diligence" into the definition; and (2) emphasize that competence means the lawyer's application and performance of skill

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<sup>1</sup> The "habitual" standard was derived from California case law which, at the time former rule 6-101 was adopted, was the primary California authority providing for discipline of incompetent members of the State Bar. See *Ridley v. State Bar* (1972) 6 Cal.3d 551, 560 [99 Cal.Rptr. 873]; *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [87 Cal.Rptr. 368]; *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-84 [58 Cal.Rptr. 564].

and knowledge, and does not merely reflect that the lawyer possesses those qualities. On the latter point, the 1983 Memorandum states:

“The rule’s definition of competence focuses upon whether or not the lawyer has performed legal services on behalf of the client competently rather than upon innate or inherent abilities, skills or qualities. The rule provides for an examination of an attorney’s conduct and actions, rather than an attorney’s intent, in the performance of legal services.” (See page 4 of the 1983 Memorandum.)

In 1989, former rule 6-101 was renumbered 3-110 as part of a comprehensive revision and renumbering of the entire rules. Rule 3-110 did not entail any major substantive revisions. (See page 31 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

Rule 3-110 was last amended in 1992. (See page 13 of Supreme Court File No. 24408, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991.) No substantive changes were made to paragraph (A) but the provision was stated more succinctly as: “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

In paragraph (B), the phrase “to perform legal services competently” in the definition was reduced to a single word, “competence.” Also, the term “ability,” defined in the 1987 version of rule 3-110(C), was merged into the definition of competence.

### C. Model Rule 1.1: Recent Amendments Concerning Outsourcing Legal Services and Technological Competence

In 2012, as part of the ABA Ethics 20/20 Commission’s review of attorney standards to determine whether any revisions were warranted in light of recent technological changes and global legal practice developments, the ABA adopted two new comments to Model Rule 1.1 (Competence) and amended a third. The two new comments provide:

#### **Retaining or Contracting With Other Lawyers**

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own

firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

The ABA also amended comment [6] (now renumbered comment [8]):

[68] 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.

The Drafting Team should also consider the foregoing changes in making its recommendations to the Commission.

#### D. ABA Model Rule 1.3 Diligence

The ABA Model Rules devote a separate rule to the concept of diligence. Model Rule 1.3 provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Neither the Commission in 1989-1992, nor the first Commission in 2010, recommended adopting Model Rule 1.3 because it took the position that diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence. Both current California Rule 3-110 and the first Commission's proposed Rule 1.1 define competence to include diligence as a key factor in assessing a lawyer's performance of legal services. The first Commission's proposed Rule 1.1, in part, provided:

(b) For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

In addition, Comment [2] of proposed Rule 1.1, derived from Model Rule 1.3, cmt. [2], described diligence similarly to Model Rule 1.3. The first Commission's comment provided:

Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. This includes pursuing a matter on behalf of a client by taking lawful and ethical measures required to advance the client's cause or objectives. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rules 1.2 and 1.4. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Based on the foregoing, the first Commission's decision not to recommend adoption of Model Rule 1.3 does not appear to have been a rejection of diligence as an important standard of professional conduct. Instead, the decision primarily recognized that California's current approach to regulating lawyer competence, which includes diligence as a key factor, was valid and need not be changed.

A minority of the first Commission favored adopting a separate diligence rule. The minority noted that while competence and diligence can be viewed together, they are distinct concepts of professional responsibility and should be so treated. Relying on both the Model Rules and the Restatement of the Law Governing Lawyers, the minority further noted that it is not enough to possess the capability to perform legal services with competence; a lawyer must employ these abilities diligently and not let the client's matter languish. For example, competence requires that a lawyer have sufficient learning and skill to ascertain the applicable statute of limitations; diligence requires that being aware of the period of limitations, the lawyer may not allow it to expire due to the lawyer's neglect and inattention. Former rule 6-101 recognized the foregoing difference by including competence and diligence in separate paragraphs. Every jurisdiction except Texas and California has adopted a separate diligence rule that requires lawyers to act with sufficient commitment and dedication in pursuing a client's matter through to conclusion. Even Texas, however, addresses the concept of diligence in a separate paragraph within its competence rule. (See Section VII.B. & note 15, below.)

The minority made two other observations in support of a separate diligence rule. First, it noted that "perhaps no professional shortcoming is more widely resented than procrastination." (Model Rule 1.3, cmt. [3].) Even when the lawyer is competent, neglect and unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer and the legal profession. Second, California case law is consistent with the

requirements of Model Rule 1.3. See Vapnek, et al., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group 2009) ¶ 6:92 ff. Yet, by recommending against adoption of Model Rule 1.3, the majority sends the wrong message that diligence is not a distinct obligation in California. The minority concluded by stating that the conflation of competence with diligence in proposed rule 1.1 would serve only to confuse lawyers about these separate and distinct obligations and would result in less public protection.

A public comment letter was submitted by a group of thirty ethics law professors. The group disagreed with the first Commission's view that diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence. The group stated: "We strongly agree with the Commission's minority report with respect to this Rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: paying adequate attention. MR 1.3 and its comments need to be approved by the Board."

Further, a point that was not raised during the first Commission's tenure is the fact that the 1975 California Rules originally contained a separate paragraph that, although part of the "competence" rule, treated diligence as a separate duty independent of competence. Former rule 6-101 was amended in 1983. (See Section II.B., above.)<sup>2</sup> Thus, former rule 6-101 originally took the same approach as do the Model Rules, the Restatement, and every other jurisdiction. (Compare Texas Rule 1.01 in note 13, below.)

The first Commission was not persuaded and did not change its view that the concept of diligence in California should continue to be included within the duty of competence. It noted that it had added Comment [2] to the proposed competence rule to clarify the relationship between diligence and competence. The first Commission also noted that

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<sup>2</sup> Former rule 6-101 provided in its entirety:

**Rule 6-101 Failing To Act Competently**

A member of the State Bar shall not willfully or habitually

(1) Perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill;

(2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed.

The good faith of an attorney is a matter to be considered in determining whether acts done through ignorance or mistake warrant imposition of discipline under Rule 6-101.

there is no evidence that the State Bar has been unable to discipline lawyers for neglect of client matters without a separate rule on diligence.

E. ABA Model Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), Rule 5.2 (Responsibilities of a Subordinate Lawyer), and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

Although there are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, there is predicate authority in the California Rules and case law that is in line with those rules. Subsection 1 discusses that authority and subsections 2, 3 and 4 describe Model Rules 5.1, 5.2 and 5.3, respectively.

1. No Direct Counterpart But There Is Predicate Authority In Rules And Case Law
  - a. Discussion Paragraph To Rule 3-110 Identifies The Duty To Supervise

The first Discussion paragraph to current rule 3-110 states: “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney employees and agents.” This Discussion paragraph provides citations to seven lawyer disciplinary cases, which<sup>3</sup> are listed below with a brief statement of the context in which discipline was imposed at least in part for a breach of supervisory responsibilities.

- *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [224 Cal.Rptr. 101]  
Lawyer was disciplined for misappropriating client money for office expenses. Lawyer’s negligence in supervising his office was a factor in the misconduct.
- *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]  
Lawyer settled client’s claim without the client’s consent. Lawyer claimed that secretarial errors caused a failure to promptly deliver the settlement proceeds to the client. This Court found that even without deliberate wrongdoing, fiduciary violations resulting from lapses in office procedure may be deemed “wilful” for disciplinary purposes and the lawyer failed to show that office staff was properly supervised.
- *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834]  
Lawyer endorsed his client’s name on a check payable to the client without client authorization and claimed that an office employee mistakenly deposited the check in the lawyer’s payroll account instead of the client trust account. This Court found the evidence demonstrated the lawyer’s pervasive carelessness in failing to give the office manager any supervision and that the lawyer generally

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<sup>3</sup> This first paragraph of the Discussion section was added operative May 26, 1989. (See Bar Misc. No. 5626, “Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation,” December 1987.)

failed to instruct the office manager on trust account requirements and procedures.

- *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 – 123 [177 Cal.Rptr. 670]  
Lawyer claimed that letter communications with a party represented by counsel without that counsel's consent were sent inadvertently by office staff. This Court found that the attorney is responsible for the work product of his employees, which is performed pursuant to his direction and authority.
- *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]  
Lawyer blamed secretary mismanagement for a disbursement from his client trust account when there were insufficient funds on deposit. This Court observed that the rule governing client trust accounts is binding upon attorneys – not lay personnel – and necessitates reasonable staff supervision in the handling of trust account matters.
- *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 – 858 [100 Cal.Rptr. 713]  
Lawyer blamed his staff for mistakes in securing an execution against client's husband to collect attorney fees that the husband had already partially paid in a divorce proceeding. This Court disciplined the lawyer for the mistakes and stated that even though an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of office staff.
- *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]  
Lawyer relied on staff and a subordinate lawyer who failed to perform legal services for client. Even after a default judgment was entered and the client repeatedly sought assurances from lawyer that relief from default would be sought, lawyer failed to check on whether the subordinate lawyer and staff actually sought relief from default. This Court disciplined the lawyer for continued neglect in overly relying on, and failing to closely supervise, the subordinate lawyer and staff.

b. Current Rule 2-400 Imposes Managerial Duties On Lawyers In Law Firms To Avoid Discrimination In The Operation Of The Firm

Current rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice) imposes duties on managing lawyers in a law firm to prohibit discrimination in employment practices or in the acceptance and retention of clients. Rule 2-400, in part, states:

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

The model rules have no counterpart to rule 2-400. Rule 2-400 will be assigned to a separate drafting team.<sup>4</sup>

c. Case Law Precedent Is Consistent With Proposed Rule 5.2

Case law is consistent with the concept that a subordinate lawyer working at the direction of another lawyer remains accountable for complying with professional responsibilities.

In *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700], at the direction of a supervising lawyer, an associate added new defendants to the action. The added defendants sued plaintiffs and their attorneys for malicious prosecution. In rejecting the associate's argument that she was merely following a supervising lawyer's instructions, the court of appeal stated:

We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney's choices. Nonetheless, however, *every attorney admitted to practice in this state has independent duties that are not reduced or eliminated because a superior has directed a certain course of action.* (See Bus. & Prof. Code, § 6068.) Thus, the fact that she was following a superior's instructions is not a valid defense to malicious prosecution.

(*Mahaffey* at p. 1546, emphasis added.)

In *In re Aguilar* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874], no one from appellant's law firm appeared at an oral argument scheduled before the California Supreme Court. Contempt proceedings were brought against the managing attorney (Aguilar) and a subordinate attorney (Kent), who had given notice to the Court of his anticipated appearance for the firm. Kent had terminated his employment with the firm days before the scheduled argument date and the managing attorney knew that another firm attorney would need to make the appearance. (*In re Aguilar, supra*, at pp. 391-392.)

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<sup>4</sup> It should be noted that the ABA Standing Committee on Professional Responsibility and Ethics is currently considering amending Model Rule 8.4 to add paragraph (g) to address discrimination related to the practice of law. The current draft of proposed Rule 8.4(g) provides that it "is professional misconduct for a lawyer to:

(g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law."

2. The Supreme Court found Kent in contempt for failing, without adequate justification, to notify the Court that he would not appear for the firm. The Court acknowledged that the firm was attorney of record. Nevertheless, it focused on the subordinate attorney's personal accountability, stating: "Kent's decision to leave the firm did not automatically terminate his professional responsibilities either to his former client or to this court." The Court reasoned: "Although Kent might have been fortunate enough to avoid any sanction had another attorney been promptly reassigned to the case, been able adequately to prepare for oral argument, and appeared at and presented oral argument on behalf of [appellant], Kent cannot avoid his share of responsibility for the interference with this court's operations that resulted when, without any advance notice, no attorney appeared . . . ." (In re Aguilar, supra, at pp. 391-392.) Model Rule 5.1 (Responsibilities Of Partners, Managers, And Supervisory Lawyers)

Model Rule 5.1 provides:

**Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

By virtue of applying to a lawyer "in a law firm," the rule applies not only to traditional law firms, but also to, among others, corporate or governmental law offices.<sup>5</sup> Further,

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<sup>5</sup> Model Rule 1.0(c) defines "firm" or "law firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or

the term “comparable managerial authority” is intended to capture those lawyers in non-traditional law office settings who have the same kind of managerial authority as in a traditional law firm.<sup>6</sup>

Paragraph (a) requires that managing lawyers make “reasonable efforts to ensure” the firm has measures that reasonably ensure the firm’s lawyers comply with the Rules. Paragraph (b) requires that a lawyer who directly supervises another lawyer make “reasonable efforts to ensure” the other lawyer complies with the Rules. Neither provision imposes vicarious liability for the lawyers under the supervisor. When lawyers are disciplined for violating paragraph (a), they are disciplined for the breach of their duty in *their failure* to supervise, not vicariously for a *subordinate’s breach* of the subordinate’s independent duty to comply with the Rules. (Compare *Matter of Galasso* (2012) 19 N.Y.3d 688, 695 [Where lawyer’s brother misappropriated client funds from lawyer’s trust account and lawyer was disciplined, the court clarified: “To be clear, respondent is not being held responsible for the criminal behavior of his brother. Rather, it is his own breach of his fiduciary duty and failure to properly supervise his employee, resulting in the loss of client funds entrusted to him, that warrant this disciplinary action.”].)

However, a lawyer will be responsible for a subordinate’s rule violation under paragraph (c), if a lawyer either ordered or ratified the conduct of the subordinate, ((c)(1)), or *knowing* of the misconduct, failed to take remedial action when there was still time to mitigate the consequences, ((c)(2)).

There are also eight comments to the Rule.

### 3. Model Rule 5.2 (Responsibilities Of A Subordinate Lawyer)

Model Rule 5.2 provides:

#### **Rule 5.2 Responsibilities Of A Subordinate Lawyer**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

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lawyers employed in a legal services organization or the legal department of a corporation or other organization.”

<sup>6</sup> See Ethics 2000 Reporter Explanation of Changes, Rule 5.1(a), (c)(1):

“This change was made to clarify in the Rule text that paragraph (a) applies to managing lawyers in corporate and government legal departments and legal services organizations, as well as to partners in private law firms. No change in substance is intended.”

The Explanation is available at:

[http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule51rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule51rem.html) (last visited 7/15/15).

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Paragraph (a) provides that a subordinate lawyer has an independent duty to comply with the Rules, i.e., the lawyer cannot claim he or she was just following orders. Paragraph (b) nevertheless provides that when the supervising lawyer reasonably resolves an arguable question of professional duty, the subordinate does not commit a violation by following the supervisor's direction. There are also two comments to the rule. As noted, there is California case law that conforms to paragraph (a). (See Section E.1.c, above.)

There are also two comments to the rule.

#### 4. Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance)

Model Rule 5.3 provides:

##### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistance**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

As can be seen, Model Rule 5.3 is very similar to Model Rule 5.1, the major difference being that it applies to nonlawyer assistants and other legal support services.

There are also four comments to the rule. One comment was revised and two new comments were added by the Ethics 20/20 Commission, primarily to address the outsourcing of legal support services. The revised comments provide (legislative blackline shows changes to the pre-Ethics 20/20 version of the rule):

[21]<sup>7</sup> Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the Rules of Professional Conduct the professional obligations of the lawyer.~~ See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer such nonlawyers within or outside the firm.~~ Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

\* \* \*

### **Nonlawyers Outside the Firm**

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

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<sup>7</sup> The Ethics 20/20 Commission switched what was comment [2] with what had been comment [1], and revised former comment [2]. What had been comment [1] was not changed.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

**III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):**

A. Jayne Kim (OCTC), \_\_\_\_\_, 2015:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. Russell Weiner (OCTC), June 15, 2010:

\* \* \*

**Rule 1.1. Competence.**

1. OCTC supports this rule so long as diligence is included either in this rule or elsewhere as in the Model Rules. OCTC does not find the Comments to this rule necessary.

\* \* \*

**Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.**

1. OCTC supports this Rule as it is simply a codification of existing California law. (See e.g. *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403; and the discussion to current rule 3-110.)

2. There are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC supports Comments 7, 13, 14 and 15.

**Rule 5.2. Responsibilities of a Subordinate Lawyer.**

1. OCTC supports this rule. It appears to be consistent with California law.

2. OCTC is concerned, however, that the Comments are too long, and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC is especially concerned with the last sentence of Comment 1, which states that if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules of Professional Conduct unless the subordinate knows the document's frivolous character. This Comment

is inconsistent with CCP section 128.7 and FRCP rule 11 (and the cases interpreting those rules), which hold that by signing a pleading an attorney is certifying that to the best of the signing attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the matter is not being presented for an improper purpose, that the claims, defenses and other legal contentions are warranted under existing law or by nonfrivolous arguments for extension, modification, or reversal of existing law, and the allegations and other factual conclusions have evidentiary support or are likely to have evidentiary support. (See *Moser v. Bret Harte Union High School District* (E.D. Cal. 2005) 366 Fed.Supp.2d 944 [public reprimand to associate attorney and law firm for filing frivolous pleadings], especially pp. 977, 978, 980, and 984.) Gross negligence would support a violation for such conduct.

### **Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.**

1. OCTC supports this rule as it is a codification of existing California law. (See e.g. *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Crane v. State Bar* (1981) 30 Ca1.3d 117, 122-123.) However, Comment 3 should be stricken.

#### **C. Mike Nisperos (OCTC), September 27, 2001:**

OCTC's recommends adding to the definition of competent representation and making it clear that reasonable diligence and prompt representation are required by this rule. The discussion section clarifies the definition of the word "repeated."

OCTC proposes the following revisions:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule "competence" in any legal service shall mean to apply 1) diligence, 2) leaning and skill, ~~and~~ 3) mental, emotional, and physical ability reasonably necessary for the performance of such service; 4) thoroughness, and 5) preparation reasonably necessary for the representation.

(C) A member shall act with reasonable diligence and promptness in representing a client. A member shall make reasonable efforts to expedite litigation consistent with the interests of the client.

~~(C)~~ (D) A member shall not represent a client when the member does not have sufficient time, resources, or current learning and skill to perform the services. If a member does not have sufficient current learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with, or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient current learning and skill before performance is required.

Discussion:

. . .

As used in this rule the word repeated does not require that the conduct be repeated in a single client matter, but may be repeated conduct in the aggregate when several client matters are considered or taken together. As such, a repeated failure to perform legal services competently may occur when the member fails to do a certain act in connection with the representation of several or multiple clients. For example, it could constitute a repeated failure to perform legal services competently for a member to fail to file civil complaints on behalf of several or multiple clients prior to the expiration of the statute of limitations.

A member has the obligation to keep current in the law, to be diligent and act promptly on behalf of his or her client. An attorney must use his best efforts to accomplish with reasonable speed the purpose for which he was employed. (Butler v. State Bar (1986) 42 Cal.3d 323, 328.) A member should, therefore, not take a case if the member does not have the time, resources, or current learning and skill to perform the services properly, subject to the exceptions provided in the rule. (See In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684).

OCTC recommends some changes to the language of the rule and in the discussion. It is believed these recommendations do not change the law but, instead, state more precisely what the law is, as interpreted by the courts. However, there has been some difference of opinion among the judges as to whether a repeated failure to perform competently must occur within a single client matter in order to constitute a violation of the rule or may be the result from a failure to do the same act on behalf of separate clients. The proposed changes would make it clear that several acts involving separate clients may be taken together where appropriate to establish a violation of the rule.

D. In a \_\_\_\_\_, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-500:

#### **IV. Public Comments Received During the Initial Public Comment Period**

- A. Lisa Wilbur, May 4, 2015 (re: 3-110) suggests that the competence rule specifically address cognitive impairment of aging lawyers.
- B. Stephen Gillers, June 9, 2015: (re: 5.1 and 5.3) Among other recommendations, Prof. Gillers recommends adopting the ABA model rules on the duty to supervise.

- C. Scott Garner, COPRAC, June 16, 2015: (re: 5.1-5.3) Recommends adopting rules addressing the supervisory obligations of lawyers, which would put these duties in the black letter rather than commentary.

**V. Potential Deficiencies in the Current Rule:**

A. See above input from OCTC, which includes the following:

1. Should add the concepts of “thoroughness” and “preparation necessary for the representation” to the definition of competence. (2001).
2. Add a separate paragraph that describes a lawyer’s independent obligation to act with reasonable diligence. (2001, 2010).
3. Modify current paragraph (C) to expressly prohibit a lawyer from accepting a representation “when the member does not have sufficient time, resources, or current learning and skill to perform the services.” That will convert what is current a commentary provision into a disciplinary rule. (2001).
4. The rule should have a comment that explains what is meant by “repeatedly.” (2001).
5. The rule should include a comment that clarifies current paragraph (C) concerning when a lawyer may accept a representation when the lawyer does not, at the time of acceptance, have the requisite skill or knowledge. (2001).

B. Other deficiencies:

1. Rule 1.1 should provide that a lawyer can be subject to discipline for “gross negligence.” (March 3, 2004 Law Professor’s letter). Question whether gross negligence is encompassed by “recklessly.”
2. There should be a separate rule or paragraph that explains the duty of diligence. (See Section II.D, above.)
3. Obligations relating to supervision should be in the black letter and not in a comment (as in Discussion to current rule 3-110).
4. The competence rule does not address a lawyer’s responsibilities concerning the use of technology in legal practice. (Compare MR 1.1, cmt. [8].)
5. The competence rule does not address the outsourcing (or offshoring) of legal services. (Compare MR 1.1, comments.)
6. The competence rule does not address outsourcing (or offshoring) of legal support services. (Compare MR 5.3, comments.)
7. The current Rules of Professional Conduct do not address the independent duty of a subordinate lawyer to comply with the law. (See Section II.E.1.c, above.)

**VI. California Context:**

A. Please refer to Section II.E.1, above.

## VII. *Approach In Other Jurisdictions (National Backdrop):*

A. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.1: Competence,” revised May 15, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_1.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.pdf) [last visited 7/15/15]

- Thirty-nine jurisdictions have adopted Model Rule 1.1 verbatim.<sup>8</sup> Seven jurisdictions have adopted a slightly modified version of Model Rule 1.1.<sup>9</sup> Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.1.<sup>10</sup>

B. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.3: Diligence,” revised May 13, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf) [last visited 7/15/15]

- Forty-two jurisdictions have adopted Model Rule 1.3 verbatim.<sup>11</sup> Seven jurisdictions have adopted a slightly modified version of Model Rule 1.3.<sup>12</sup> Two jurisdictions do not have a separate diligence rule.<sup>13</sup>

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<sup>8</sup> The thirty-nine jurisdictions are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>9</sup> The seven jurisdictions are: Alaska, District of Columbia, Georgia, Louisiana, Nebraska, New York, and North Carolina.

<sup>10</sup> The five jurisdictions are: California, Michigan, New Hampshire, New Jersey, and Texas.

<sup>11</sup> The forty-two jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>12</sup> The seven jurisdictions are: Alabama, District of Columbia, Georgia, Massachusetts, New York, Oregon, and Virginia.

<sup>13</sup> The two jurisdictions are: California and Texas. Although Texas does not have a separate diligence rule, its competence rule (Texas Rule 1.01) has two separate paragraphs devoted to the concept of diligence:

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

C. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers,” revised May 5, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_1.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.pdf) [last visited 7/15/15]

- Thirty-one jurisdictions have adopted Model Rule 5.1 verbatim.<sup>14</sup> Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1<sup>15</sup> Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 5.1.<sup>16</sup> One jurisdiction has not adopted a version of Model Rule 5.1.<sup>17</sup>

D. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer,” revised May 5, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_2.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf) [last visited 7/15/15]

- Forty-three jurisdictions have adopted Model Rule 5.2 verbatim.<sup>18</sup> Five jurisdictions have adopted a slightly modified version of Model Rule 5.2.<sup>19</sup> Three jurisdictions have not adopted a version of Model Rule 5.2.<sup>20</sup>

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(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

<sup>14</sup> The thirty-one states are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>15</sup> The fourteen jurisdictions are: Alabama, Alaska, District of Columbia, Florida, Georgia, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Vermont, and Virginia.

<sup>16</sup> The five jurisdictions are: New Jersey, New York, Ohio, Oregon, and Texas.

<sup>17</sup> The one jurisdiction is California.

<sup>18</sup> The forty-three jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

E. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.3: Responsibilities Regarding Nonlawyer Assistants,” revised May 5, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf) [last visited 7/15/15]

- Thirty-four jurisdictions have adopted Model Rule 5.3 verbatim.<sup>21</sup> Ten jurisdictions have adopted a slightly modified version of Model Rule 5.3.<sup>22</sup> Six jurisdictions have adopted a version of the rule that is substantially different to Model Rule 5.3.<sup>23</sup> One jurisdiction has not adopted a version Model Rule 5.1.<sup>24</sup>

### **VIII. Public Comment Received by the First Commission:**

The clean text of proposed new rules 1.1, 5.1, 5.2, and 5.3 drafted by the first Commission and adopted by the Board to replace rule 3-110 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rules differ from current rule 3-110, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 3-110 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

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<sup>19</sup> The five jurisdictions are: Connecticut, Florida, Georgia, Ohio, and Texas.

<sup>20</sup> The three jurisdictions are: California, Kentucky, and Virginia.

<sup>21</sup> The thirty-four jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Following Ethics 20/20, there were no amendments made to the black letter of Model Rule 5.3, only the Comments.

<sup>22</sup> The ten jurisdictions are: Alabama, Alaska, District of Columbia, Hawaii, Kentucky, New Hampshire, Ohio, Oregon, Tennessee, and Virginia.

<sup>23</sup> The six jurisdictions are: Florida, Georgia, New Jersey, New York, North Dakota, and Texas.

<sup>24</sup> The one jurisdiction is California.

**IX. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:**

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should be revised to delete the longstanding California standard prohibiting intentional, reckless or repeated acts of incompetence and substitute a new standard which states affirmatively that a lawyer must provide competent representation to a client. (See *Lewis v. State Bar* (1981) 28 Cal.3d 683, 688 [170 Cal.Rptr. 634].) (Compare ABA MR 1.1.)

(2) Whether a "gross negligence" standard should be added to the competence rule, together with "intentionally, recklessly or repeatedly." (See March 3, 2014 Law Professors' Letter.)

(3) Whether the concept of diligence should be separated from the competence rule and set forth as a new standalone rule. (Compare ABA MR 1.3.)

(4) Alternatively, whether the concept of diligence should be separated from the concept of competence and stated in a separate paragraph in the competence rule, similar to the 1975-1983 version of former rule 6-101, (see section II.D, above), and Texas Rule 1.01(b), (c), (see note 13.)

(5) Whether to retain a lawyer's duty to supervise as a concept subsumed within competence or recommend adoption of a new standalone rule(s) on supervision. (Compare ABA MR 5.1, 5.2 and 5.3; see rule 3-110, Discussion.)

(6) Whether to address the independent duty of a subordinate lawyer to comply with the law in a separate rule, similar to Model Rule 5.2. (See Section II.E.1.c, above.)

(7) Whether the rule should be revised to address to what extent, if any, the duty of competence includes a lawyer's knowledge and understanding of modern technology used in the practice of law, such as "cloud computing." (See [State Bar Formal Op. No. 2010-179](#). See also ABA MR 1.1, Comment [8].)

(8) Whether and to what extent the competence rule or a rule setting forth a lawyer's duty to supervise other lawyers should address the outsourcing and/or offshoring of legal services.

(9) Whether and to what extent the competence rule or a rule setting forth a lawyer's duty to supervise or monitor nonlawyer assistants or the procurement of nonlawyer assistance should address the outsourcing and/or offshoring of legal support services.

## X. **Research Resources:**

Re: Duty to Supervise

- [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]
- [Gadda v. State Bar](#) (1990) 50 Cal.3d 344, 353-354
- *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403Re: Former Rule 6-101 (wilful or habitual incompetence)
- [Ridley v. State Bar](#) (1972) 6 Cal.3d 551, 560 [99 Cal.Rptr. 873]
- [Simmons v. State Bar](#) (1970) 2 Cal.3d 719, 729 [87 Cal.Rptr. 368]
- [Grove v. State Bar](#) (1967) 66 Cal.2d 680, 683-84 [58 Cal.Rptr. 564]

Re: Duty of Subordinate Lawyer

- [Jay v. Mahaffey](#) (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700]
- [In re Aguilar](#) (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]
- [Moser v. Bret Harte Union High School District](#) (E.D. Cal. 2005) 366 Fed.Supp.2d 944

Re: Diligence

- [Butler v. State Bar](#) (1986) 42 Cal.3d 323, 328
- *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684
- [In re Sanders](#) (1999) 21 Cal.4th 697 [87 Cal.Rptr.2d 899]
- *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366.

Re: Discipline for Negligence

- [Lewis v. State Bar](#) (1981) 28 Cal.3d 683, 688 [170 Cal.Rptr. 634]
- [Calvert v. State Bar](#) (1991) 54 Cal.3d 765 [1 Cal.Rptr.2d 684]
- *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41
- [Friday v. State Bar](#) (1943) 23 Cal.2d 501, 505 [144 P.2d 564]
- [Bruns v. State Bar](#) (1941) 18 Cal.2d 667 [117 P.2d 327]

Re: Model Rule 1.1

- *In The Matter of Welcome* (2013) 2013 WL 708162
- [Broome v. Mississippi Bar](#) (Miss. 1992) 603 So.2d 349
- [In re Disciplinary Action Against Hoffman](#), 2005 ND 153, 703 N.W.2d 345
- [State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Orr](#) (2009) 759 N.W.2d 702 [277 Neb. 102]
- 7 Am.Jur.2d (2007 ed.)

Re: Competence in Technology

- [State Bar Formal Op. No. 2010-179](#)