RRC2 – Rule 3-110 [1.1, 1.3, 5.1, 5.2, 5.3]
E-mails, etc. – Revised (9/22/15)
Kehr (Lead), Clopton, Kornberg, Peters, Rothschild

Table of Contents

September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 2-400 [8.4.1] was received and is attached. Please consider these comments prior to the September meeting.

Attached:
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.docx
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.pdf

September 2, 2015 OCTC Memo to Commission:

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

1. 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.

2. 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.

September 2, 2015 Kehr Email to Drafting Team, cc

I have attached an edited Report that inserts the content of today's OCTC letter on these proposed Rules. The first paragraph of the letter recommends retention of the current rule 3-110. Because we are recommending this in substance, I have added nothing to the Report on this. The second paragraph says that the current rule addresses supervision, which is correct, but the OCTC letter does not recognize the additional client protection that would be afforded by adopting versions of MR 5.1-5.3. OCTC has made no comment except by implication on our recommendation to not adopt any version of MR 1.3, and that implication seems to be that 1.3 is not needed. I have made no other changes to the Report.

Attached:
RRC2 - [3-110][1.1] - Report & Recommendation - DFT2.4 (09-02-15).docx

September 15, 2015 Cardona Email to Drafting Team, cc Difuntorum, Mohr & McCurdy:

Two what I hope are relatively minor comments:

(1) Rule 5.2, Comment [1]: I understand your reasoning, but I do not think the sentence, "A subordinate lawyer has no general obligation to supervise a supervising lawyer," gets at the point that is intended by the comment. It is not that the subordinate has no general obligation to supervise the supervisor (which I think we all agree with), but that in certain circumstances the subordinate can act at the supervisor's direction and need not question those directions (even if such questioning might not rise to the level of supervision). Thus, I prefer the language of the

RRC1 comment and suggest that the concept it states be retained, with the language streamlined as follows: "Acting at the direction of a supervisor, though it does not relieve a lawyer of responsibility for a violation, may be relevant in determining whether the lawyer has violated the Rules. For example, a subordinate who signs a frivolous pleading a the direction of a supervisor would not violate the Rules or the State Bar Act unless the subordinate knows of the document's frivolous character."

(2) Rule 5.3(c)(2): This is the analogue to Rule 5.1(c)(2), which addresses responsibility for violations by subordinate attorneys. In Rule 5.1(c)(2), the proposed rule makes clear that where premised on "direct supervisory authority," responsibility for a violation by a subordinate attorney applies whether or not the subordinate attorney is "a member or employee of the same law firm." I see no basis for not applying the same standard where a lawyer is directly supervising a nonlawyer assistant. Thus, I suggest that 5.3(c)(2) be modified to read (additional language in bold): "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, **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."

September 16, 2015 Tuft Memo to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

1. Paragraph (a) I believe the commission should decide as a matter of policy whether the duty of competence should be limited to intentional, reckless or repeated misconduct or whether paragraph (a) should conform to the national standard that a lawyer shall provide competent representation to a client. The duty of competence is a base-line duty of professional responsibility that cannot be waived. Rest. §16, Cmt d. - "A lawyer must be competent to handle a matter, having the appropriate knowledge, skills, time and professional qualifications." The standard reflected in MR 1.1 cannot fairly be described as aspirational. No lawyer should be allowed to render incompetent legal services.

Our current rule is derived from a historical concern by lawyers in California that discipline should not be imposed for acts of mere negligence or mistakes in judgment. Civil liability based on conduct that violates the standard of care under tort law is not synonymous with the duty of competence. Competent and diligent lawyers make mistakes that may constitute professional negligence but do not violate the duty of competence. Most disciplinary codes expressly or implicitly exclude simple acts of negligence. California has gone farther than any other jurisdiction in restricting discipline to conduct that is intentional, reckless or repeated. Aside from being inaccurate and a source of confusion,[1] it is questionable whether the public is adequately protected by maintaining these restrictions that are not found in any other rule.[2]

Concerns that the rule in other jurisdictions focuses on possessing rather than applying attributes of competence can be adequately addressed in paragraph (b) of the rule. Paragraph

[1] Paragraph (a) is misleading in that a single act of gross negligence can be grounds for discipline.

[2] I believe that the catalyst for changing former rule 6-101 in 1983 was CJ. Bird's concurring opinion in *Lewis v. State Bar* (1981) 28 Cal. 3d 683, 690 expressing concern that language such as "willfully and habitually" and "knows or reasonable should know" made it unclear whether and under what circumstances "mere negligence" is punishable under the rule.

(a) should set forth the standard. Paragraph (b) should define competence for purposes of the rule as applying the requisite capabilities necessary for the performance of legal services.

Clearly, discipline should not be used to punish lawyers for mere negligence or mistakes in judgment. The issue is whether adopting the national standard in paragraph (a) would materially change how the rule is applied. I believe the Supreme Court would not allow that to occur. [3]

However, if the decision is to maintain a state of mind or culpability requirement in paragraph (a), we should examine whether "intentionally, recklessly or repeatedly" is the right standard. "Intentionally" is rarely used in the rules. Instead, "knowingly" is the more common standard and has a defined meaning. Model Rule 1.0(k).[4] "Recklessly" can have a different meaning depending on the circumstances[5] and is misleading since a single act of gross negligence can be a basis for discipline. "Repeatedly" is appropriate not only to protect consumers from a pattern of incompetence but to also address situations where impaired lawyers with the best of intentions mistakenly believe that they can continue to serve their clients.[6]

If the national standard that a lawyer shall provide competent representation to a client is not acceptable to the Commission, I propose the following alternative:

(a) A lawyer shall not knowingly or repeatedly fail to perform legal services with competence.

2. Paragraph (b). Competence and diligence are considered distinct duties of professional responsibility. Rest. §16(2). A lawyer must have the legal acumen and capacity to handle a client matter.(i.e., competence) The lawyer must employ those capacities diligently by not letting the client's matter languish and proceed to perform the services called for with reasonable promptness and dedication. [Rest. §16, Cmt. d]. Former rules spoke in terms of the duty to act "zealously" for a client. [e.g., EC 7-1 of the ABA Code of Professional Responsibility (1969)]

The rules in every jurisdiction except California and Texas maintain the distinction between the duties of competence and diligence. Indeed, former rule 6-101 treated competence and diligence separately. The distinction is important from a public protection perspective and is not aspirational. Competent lawyers who have the requisite training, learning and skill are nevertheless found too often to neglect client matters. Conflating the two duties creates confusion and does not promote compliance. I recommend that the drafting team

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[3] The Supreme Court in *Lewis v. State Bar* stated: "This court has long recognized the problems inherent in using disciplinary proceedings to punish lawyers for negligence, mistakes in judgment, or lack of experience or legal knowledge." 28 Cal 3d at 688-689.

[4] It is rare, if ever, that a lawyer would "intentionally" render incompetent legal services to a client. It is more likely that a lawyer would knowingly fail to do so. "Knowingly" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances. MR 1.10(k).

[5] According to Black's Law Dictionary (3d. ed.) "Reckless" denotes not recking, careless, heedless, inattentive, indifferent to consequences. "According to the circumstances, 'reckless' may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent."

[6] This situation is receiving greater attention nationally with the aging of lawyers (present company excepted).

reconsider Model Rule 1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client).

3. Paragraph (c). We should retain "may nonetheless provide competent representation. . .". Lawyer codes uniformly use "may" to denote permission to engage or refrain from certain conduct and we should retain that usage. While both "may" and "might" can mean permission, "might" also denotes possibility or probability while "may" is commonly understood (according to Webster's Third International Dictionary) to denote "being able to" or "have permission to" and is the common usage in rules of professional conduct.

Moreover, it is confusing to use "may" and "might" in the same rule (compare paragraphs (c) and (d). Better comprehension is achieved by employing "may" throughout the rules to denote conduct that is permitted.

4. In paragraph (c), the phrase "when undertaking legal services" should be changed to "when undertaking to perform legal services" to make it clear that the duty of competence is measured at the time the services are to be performed and not when the lawyer accepts the representation.

5. There is no explanation why the exception in paragraph (d) should not apply where association with another lawyer would be impractical. See comment [3] to Model Rule 1.1.

6. Comments The proposed comment incorrectly refers to rule 5.1 as the lawyer's responsibility for supervising subordinate lawyers. More accurately, rule 5.1(a) deals with the supervision of all lawyers in the firm while rule 5.1(b) deals with direct supervisory duties over other lawyers.

7. In view of the importance of maintaining competence and the risks associated with increasing reliance on technology, it would enhance public protection to include a comment similar to Model Rule Comment 8. I offer a refined version as comment 2:

> [2] Lawyers are required to maintain the requisite knowledge and skill to perform legal services competently by keeping abreast of changes in the law and law practice, including the benefits and risks associated with relevant technology, and complying with continuing legal education requirements.

September 17, 2015 Rothschild Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Here are my responses to Mark's comments:

1. This is a topic we discussed at length, and it is A among our concepts rejected. I agree it is for the full commission to decide, but I don't believe we ought to change the report before the meeting.

2. I do not believe we need to reconsider 1.3. I think we came to the correct conclusion. I think Mark's comment talks about "competence" in terms of possessing the necessary skills, etc., our draft focusses on the conduct of the lawyer in using the skills, rather than the possession. In Mark's context, that is if we follow the Model Rule for (a), he is right that diligence is separate. With the way we have drafted (a), I think diligence is part of acting competently, and .3 is not necessary.

3. I think we are fine with the current draft, but I don't think this is a big issue.

4. On this one, the clean version of the new rule and the redline version differ. The clean version shows the language Mark suggests, while the redline shows the version he objects to. I understand Mark's concern, and I think I agree with him. Since the change was made only to convert from passive to active voice, maybe there is a clearer, active voice way to say it.

5. I think Mark is right on this one.

6. I am comfortable leaving the general reference to 5.1, rather than the pinpoint cite to 5.1 (b), but I don't consider it a big deal.

7. I agree with our decision to leave out the reference to technology in the comment. There are lots of things included in competence. I don't believe technology rises to a higher level than any other to justify a separate comment. And to suggest that continuing education requirements, at least in their current form in California, have anything to do with competence – really?

September 18, 2015 Clopton Email to Rothschild, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

I concur.

September 19, 2015 Kehr Email to Tuft, cc Drafting Team, Difuntorum, Mohr, A. Tuft & Lee:

When your email on Rule 1.1 came in the night before last my first thought was of the old story of the prisoners who had been locked up together for so long that they not only knew all of the same jokes but had numbered them to avoid wasting time on retelling them. One prisoner would say "27" and the others would laugh. I knew what the first point in your Memo would be without having to open it. Have we served together too long in the same facility? You raise a serious issue and will have to reprise our discussion on this for the Commission.

I generally agree with Toby's 9/17/15 email and have only a few things to add:

4. I agree with Mark's observation about the difference between measurement when accepting a representation and when performing the legal services, but I have the opposite view of the meaning of paragraph (c). It is paragraph (a) that sets the disciplinary standard of competence. Paragraph (c) merely adds the thought that a lawyer is permitted to accept a representation without having the necessary ability at that moment so long as the lawyer is able to obtain the necessary skill by the time the lawyer does the work (and thereby meet the paragraph (a) standard). Would paragraph (c) be clearer if we were to revise it to begin: "A lawyer who does not have sufficient learning and skill when accepting a representation nonetheless might [or "may" if the Commission accepts Mark's earlier suggestion] provide competent representation by 1) associating ...."?

5. I agree. Here is an edited version of paragraph (d): "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances."

7. I don't disagree with Mark in principle. The first Commission included a great deal of material in the Comments that we thought would prove helpful to lawyers and assist them in performing their duties to their clients and to the courts, but that went beyond what was needed to explain the meaning of the Rules to which the Comments were attached. We have a new set of marching orders (and a strict time limit) that will foreclose what the first Commission spent so much time creating.

September 19, 2015 Kehr Email to Cardona, cc Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

(1) I'm fine with your suggestion but would reorder your language into the active voice:

> A lawyer is not relieved of responsibility for complying with these Rules and the State Bar Act by reason of acting at the direction of a supervisor, but this might be relevant in determining whether the subordinate lawyer has violated the Rules or the State Bar Act. For example, a subordinate who signs a frivolous pleading at the direction of a supervisor would not commit a violation unless the subordinate knows of the document's frivolous character.

(2) My recommended edit to Rule 5.1(c)(2) was intended to make explicit what I think it implicit in the MR language. My failure to make the same change in Rule 5.3(c)(2) was my oversight and was not intended to introduce a lesser supervisorial responsibility with nonlawyer personnel. Thank you for catching this. I agree with your solution except for the word "member", which I think would be limited to partners and shareholders and therefore necessarily excludes nonlawyer personnel. I therefore would change your insertion to say: "… whether or not an employee of the same law firm, …." Wouldn't you want the same change to be made in Rule 5.3(b) so that it tracks Rule 5.1(b)?

September 19, 2015 Rothschild Email to Drafting Team, cc Cardona, Difuntorum, Mohr, McCurdy & Lee:

I agree with Bob's suggestions, including the rewording of 5.2 comment 1 and the additions to 5.3 (c) (2) and 5.3 (b).

September 19, 2015 Cardona Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I too agree. Thanks.

September 19, 2015 Kornberg Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I agree with these proposed revisions.

September 20, 2015 Kehr Email to Difuntorum, cc Mohr, McCurdy & Lee:

I'm not certain what the drill is on this. Should we create a revised drafts of proposed Rules 5.2 and 5.3 so they can be circulated either at or before the next meeting?

September 21, 2015 Difuntorum Email to Kehr, cc Mohr, McCurdy & Lee:

If you provide Mimi with the revised drafts she can make copies for distribution at the meeting or post them as supplemental materials. Since there will likely be an email compilation for this rule, posting revised drafts seems like the right approach. Please send Mimi the revised drafts as soon as possible with copies to me and Kevin. Thanks.

September 21, 2015 Kehr Email to Difuntorum, cc Mohr, McCurdy & Lee:

It will be this evening.

September 22, 2015 Kehr Email to Lee, cc Drafting Team, Difuntorum, Mohr & Lee:

Here is an edited draft of Rules 1.1, 5.2, and 5.3 based on suggestions by George and Mark. The redlining compares to the agenda versions. Other issues remain open.

Attached:
RRC2 - [3-110][1.1][1.3][5.1 -5.3] - Rules 1.1, 5.2 & 5.3 - DFT3 (09-22-15) - Cf. to DFT2.3.docx