Rule 1.1 [3-110] Competence
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

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

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

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

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

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.1
(Current Rule 3-110)
Competence

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-110 (Failing to Act Competently) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterpart, Model Rule 1.1 (Competence). The result of the Commission's evaluation is proposed rule 1.1 (Competence). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

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

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

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

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

Third, the Commission is recommending deletion of the existing Discussion paragraph that provides case citations addressing a lawyer's supervision obligations. Rather than relying on case citations, the Commission is recommending three new separate rules on supervision (see the executive summaries of proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer) and 5.3 (Responsibilities Regarding Nonlawyer Assistants). This is consistent with the approach to the duty of supervision in most jurisdictions.

Rule 1.1 [3-110] ~~Failing to Act Competently~~Competence
(Redline Comparison of the Proposed Rule to Current California Rule)

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

(~~B~~b) For purposes of this ~~rule, "~~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~~c) If a ~~member~~lawyer does not have sufficient learning and skill when the legal ~~service is~~services are undertaken, the ~~member may~~lawyer nonetheless ~~perform such services competently~~may provide competent representation by (1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably ~~believed~~believes* to be competent, ~~or~~ (2) ~~by~~ 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 ~~where~~if referral to, or association or consultation with, another lawyer would be impractical. ~~Even~~ Assistance in an emergency~~, however, assistance should~~ must be limited to that reasonably* necessary in the circumstances.

~~Discussion~~Comment

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

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

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

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

Commission Drafting Team Information

Lead Drafter: Robert Kehr
Co-Drafters: Judge Karen Clopton, Howard Kornberg, Toby Rothschild

Meeting Dates at which the Rule was Discussed: September 25-26, 2015 and November 13 – 14, 2015

Action Summary Approval Date: January 22, 2016

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. COMMISSION RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

At the Commission's September 25-26, 2015 meeting, the Commission voted 13-2-0 to recommend adoption of the proposed rule, with Messrs. Ham and Tuft voting no.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

At the Commission's November 13 – 14, 2015 meeting, all members present voted to recommend adoption of proposed Rule 1.1, as amended during the meeting.

III. PROPOSED RULE (CLEAN)

Rule 1.1 [3-110] Competence

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

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

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by 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 association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

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

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

Rule 1.1 [3-110] ~~Failing to Act Competently~~Competence

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

(~~B~~b) For purposes of this ~~rule, "~~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~~c) If a ~~member~~lawyer does not have sufficient learning and skill when the legal ~~service is~~services are undertaken, the ~~member may~~lawyer nonetheless ~~perform such services~~

~~competently~~may provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably ~~believed~~believes* to be competent, ~~or~~ 2) ~~by~~ 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 ~~where~~if referral to, or association or consultation with, another lawyer would be impractical. ~~Even~~ Assistance in an emergency~~, however, assistance should~~ must be limited to that reasonably* necessary in the circumstances.

~~Discussion~~Comment

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

[1] This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

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

V. 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.

- **State Bar Court:** No comments received from State Bar Court.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3-110 [1.1]

VI. 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 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
- Thirty-nine states have adopted Model Rule 1.1 verbatim.[1] Seven jurisdictions have adopted a slightly modified version of Model Rule 1.1.[2] Five states have adopted a version of the rule that is substantially different to Model Rule 1.1.[3]

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

A. Concepts Accepted (Pros and Cons):

1. Recommend changing from passive to 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. Changing this to "another lawyer whom the lawyer reasonably believes to be competent" clarifies 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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[1] The thirty-nine states are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[2] The seven jurisdictions are: Alaska, District of Columbia, Georgia, Louisiana, Nebraska, New York, and North Carolina.

[3] The five states are: California, Michigan, New Hampshire, New Jersey, and Texas.

2. Recommend augmenting the standard of "recklessly" by the addition of "grossly negligent." This addition was suggested by the law professors' March 3, 2004 letter/
   - Pros: This change conforms the disciplinary rule to disciplinary case law. The inclusion of this language should advance Charter principle #4 and facilitate compliance and enforcement of the Rule.
   - 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 discipline. (See Doyle v. State Bar (1976) 15 Cal.3d 973, 978 [126 Cal.Rptr. 801, 544 P.2d 937].)"

3. Recommend adoption of versions of Model Rules 5.1 to 5.3 rather than retaining the duty to supervise only as an element of the duty of competence, as set forth in the Discussion to current rule 3-110.

   Summary of Model Rules 5.1 to 5.3. Model Rule 5.1 states, among other things, a lawyer's duty to supervise other lawyers, and Model Rule 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 Model Rules 5.1 and 5.3 are not necessary. However, as discussed more fully in the Reports for those rules, the Commission recommends the adoption of versions of these two

model rules (and of Model Rule 5.2, which addresses a subordinate lawyer's duties).

- Pros: There are a number of reasons to support this recommendation: (1) Current rule 3-110 works reasonably 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, twenty or even forty lawyers working on a major project?

  (2) Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty of 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 also to 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, to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a considerably wider application than the supervision standard currently part of rule 3-110.

  (3) The broader application of Model Rules 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 as to the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 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. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would also provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions.

  (5) Model Rules 5.1 and 5.3 clarify 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) Model Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the firm.

  (7) Adopting versions of the Model 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: Model Rule 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."

  In response to this criticism, the Commission notes:

  (1) Although 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.

  (2) 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.

  (3) Although Mr. Schwartz's letter addressed Model Rule 5.1, his comments and the Commission's response apply equally to MR 5.3.

- Recommendation: The Commission's recommendations for Rules 5.1 – 5.3 are contained in a separate Report and Recommendation for each proposed rule.

4. Recommend that the concept of diligence, now encapsulated in paragraph (B) of current rule 3-110, be moved into a new, standalone rule, numbered 1.3 to correspond to the Model Rule counterpart.
   - Pros: See proposed Rule 1.3, Report & Recommendation.
   - Cons: See proposed Rule 1.3, Report & Recommendation.

5. Recommend the adoption of two comments, one that cross-references the supervision rules (5.1 to 5.3), (see paragraph3, above), and the other that cross-references proposed Rule 13, (see paragraph 4, above).
   - Pros: Including these cross-references will direct lawyers to the rules that, if adopted, will address the concepts that are recommended for these new, standalone rules.
   - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Revise the rule to reject the long-standing California standard that subjects a lawyer to professional discipline only for intentional, reckless, or repeated acts of incompetence and instead subject lawyers to discipline for acts of simple negligence as provided in Model Rule 1.1.
   - Pros: The essential argument in favor of adopting the ABA Model Rule approach is that it would create greater national uniformity and widen the scope of discipline for lawyers' professional errors. It would also "promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the

public," (Charter principle #1), by expressly stating that lawyers "shall provide competent representation to a client."

- 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 Model Rule 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 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. In public comment dated May 4, 2015, Lisa Wilbur suggested specifically addressing the cognitive impairment of aging lawyers.
   - Pros: None identified.
   - Cons: The Commission recognizes that impairment due to aging is an important topic, but is unable to identify any way in which impairment due to age differs from impairment having any other cause. The Commission also cannot see how to address any specific sort of competence in a disciplinary Rule. In addition, the Commission does not see any way to write a disciplinary standard that would provide meaningful protection against any particular cause of deficient performance, whether the cause is age, substance abuse, or anything else.

3. Recommend augmenting paragraph (c) by adding "*4) thoroughness, and 5) preparation reasonably necessary for the representation"* as OCTC recommended in a letter dated September 27, 2001.
   - Pros: Including this language is 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.

   In any event, the Commission has recommended the adoption of proposed Rule 1.3 (Diligence).

4. Recommend adoption of the comments to Model Rule 1.1.
   - Pros: None identified.
   - Cons: The Comments to Model Rule 1.1 for the most part either are incorrect in that they conflict with the long-standing California approach to competence in a

disciplinary rule, (see paragraph B.1, above), conversational, expressions of good practices, or not necessary because included as part of the recommended Rule.

5. Recommend that proposed Rule 1.1 address a lawyer's responsibilities concerning the use of technology.[4]
   - Pros: On the recommendation of the ABA Ethics 20/20 Commission, the ABA revised Comment [8] to Model Rule 1.1 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.

6. Recommend that proposed Rule 1.1 address outsourcing or offshoring of legal services.[5]
   - 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: The Commission concluded that there was nothing in this topic that would make the proposed rule more complete. As a comment, the topic would not explain the Rule but instead would provide practice guidance on the possible risks of using outside lawyers.

7. Recommend that proposed Rule 1.1 include a Comment explaining proposed paragraph (c).
   - Pros: 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

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[4] Model Rule, 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."

[5] MR Comment [6] discusses at some length the situation in which a lawyer retains or contracts with other lawyers.

defense when the potential outcome is the death penalty.

- Cons: 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 Commission concluded that no Comment is needed to clarify that consultation with others, or the other steps described in paragraph (c), would be adequate for a lawyer to provide competent legal services.

8. Recommend adoption of 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. The Commission concluded that a comment would not be helpful or reliable in capturing those various contexts.

9. Recommend a definition of "competence" in Proposed Rule 1.1(b) that would recognize that differences in legal resources, skills, and expectations may exist between different communities? This was a comment made to the first Commission by State Bar's Law Practice Management & Technology Section. The Commission disagreed with this novel suggestion and recommends against it. The Commission is unaware of any evidence that resources vary by locale, and in fact in the age of the Internet, the opposite would appear to be true. In summary, there should not be different and indefinite standards of competence for disciplinary purposes.

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

1. Proposed Rule 1.1 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. (See Reports and Recommendations for proposed Rules 5.1 and 5.3).

D. Non-Substantive Changes to the Current Rule:

1. 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. (See Report and Recommendation for proposed Rule 5.2).

E. Alternatives Considered:

None.

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3-110 [1.1]
VIII. COMMISSION RECOMMENDATION FOR BOARD ACTION
Recommendation: That the Board of Trustees of the State Bar of California adopt proposed amended Rule 1.1 [3-110] in the form stated above for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the rules.
IX. DISSENTING POSITION(S)
None.
X. FINAL COMMISSION VOTE/ACTION
Date of Vote: November 13 – 14, 2015 Action: Approve Rule 1.1 [3-110] as revised during the meeting Vote: 16 (yes) – 0 (no) – 0 (abstain)