

TOTAL = 7 Agree = 2
Disagree =
Modify = 5
NI =

Rule 1.1 Competence. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association	A	Yes		<p>Majority = support as drafted.</p> <p>Dissent = paragraph (a) should be deleted; and paragraph (b) should be modified to include the concept of "loyalty."</p>	<p>Majority – no action needed.</p> <p>Minority – Commission disagreed with the dissenting views and did not make the requested revisions because the changes would depart from the Commission’s proposed affirmation of California’s longstanding approach to regulating competence (see the Model Rule comparison chart).</p>
2	William Balin & Andrew Dilworth		No		<p>Competence is one of the fundamental duties owed by a lawyer to client and is integral to preserving public confidence and trust in the administration of justice. The proposed rule, as drafted, tends to undermine this confidence.</p> <p>Whereas the ABA Model Rule articulates an <i>affirmative</i> duty of competence in the handling of all legal matters, the proposed rule speaks only to a prohibition against a “subset” of incompetent conduct. The directive of the rule is not an affirmative obligation to act competently in all matters but rather a prohibition against acting incompetently <i>if</i> the incompetence is intentional, reckless or repeated.</p>	<p>The Commission disagrees with this assessment; it proposes to retain California’s longstanding approach to the regulation of competence.</p> <p>The Commission believes that a single act of incompetence should not be the subject of discipline, exactly as it is now.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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				Comment [1]	<p>Comment [1] states without qualification” “[i]t is the duty of every lawyer to provide competent legal services to the client.” If this is the position of the RRC, it is unclear why this affirmative duty is not stated in the rule. At a minimum, putting the general duty in the Comment, and having the rule speak to only a subset of such conduct, is confusing.</p> <p>We suggest that the substance of the rule should set forth the affirmative obligation of the attorney, and if there are exceptions or nuances to be provided with respect to the application of the rule they should be in the Comments.</p>	<p>Comment 1 sets out the general rule that lawyers should provide competent legal services. The Commission does not agree that this is confusing.</p> <p>See comments above.</p>
				Comment [6]	<p>The dichotomy between the language of the rule and Comment [1] is heightened by the language of Comment [6] which provides: “[t]his rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.” This is problematic for several reasons.</p> <p>First, the rules are rules of discipline, not a basis for civil liability. Linking the application of the rule to the civil concept of “negligence” is unnecessary and likely to create confusion.</p>	<p>The Commission disagrees. The proposed rule is substantially the approach of the current rule and its predecessors.</p>

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					<p>Second, the substance of the rule suggests that a single act of negligent conduct that is “intentional” or “reckless” <i>can</i> constitute a violation of the rule. The Comment’s generalized statement that the rule is “not intended to apply to a single act of negligent conduct” is at odds with this language.</p> <p>Third, the language of the Comment does not articulate the full scope of conduct that could fall within the rule and is likely to create confusion.</p> <p>We appreciate the RRC’s thought behind the proposed rule and the desire to reconcile the rule with CA Supreme Court’s holding in <i>Lewis v. State Bar</i>. But, we suggest that the rule and its comments do not fully reflect the body of law surrounding the issues raised in <i>Lewis</i>, and may not provide the guidance to practitioners intended by the RRC.</p> <p>Given the factual circumstances involved in <i>Lewis</i>, and the comments of both the majority and concurring opinions, it is not clear that <i>Lewis</i> stands for, or mandates, the proposition that a “single act of negligent conduct” could not be actionable, or that conduct that is intentional or repeated may serve as a basis for discipline.</p>	

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					<p>Accordingly, to the extent that Comment [6] is intended to recognize the holding in <i>Lewis</i>, it appears to be overbroad in its' suggestion that a "single act of negligent conduct" could not constitute a violation of the duty of competence under CA law.</p> <p>BASF Ethics Subcommittee members familiar with State Bar disciplinary proceedings have noted that as a practical matter the State Bar will, and does, prosecute single acts of incompetence when the conduct is egregious enough. Accordingly, we suggest that Comment [6], as drafted, is in tension with the substantive language of the proposed rule, as well as existing CA law and the practical realities of State Bar disciplinary proceedings.</p> <p>The above mentioned issues could be resolved by adopting an affirmative rule on competence that mirrors ABA Model Rule 1.1, and leaves out Comment [6] which furthers the RRC's charge to try and heighten uniformity with the ABA Model Rules.</p> <p>Alternatively, if Comment [6] remains, we suggest modifying the Comment to acknowledge that, while a single act of "ordinary negligence" or a single mistake in a particular mater is not "generally' intended to</p>	

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					constitute a violation of the rule, such conduct could violate the rule if it is intentional, reckless, repeated or rises to the level of gross negligence.	

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3	Bradley Paulson	D	No	1.1(a)	<p>Commenter, in general, is concerned with attorney conduct in regard to soliciting clients in the area of Homeowner's Notice of Claim of Violation of Functionality Standards, per Civil Code section 910 and Senate Bill 800.</p> <p>Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code section 910 and other areas as outlined in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow the Civil Code and Legal Ethics. The State Bar is not involved.</p>	<p>These comments are concerned with issues of enforcement of the rules that is a subject beyond the purview of the Commission.</p>

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4	CA State Bar Law Practice Management & Technology Section (LPMT)	M	Yes	(b)	<p>LPMT believes that the definition of "competence" in Proposed Rule 1.1(b) should expressly recognize that differences in legal resources, skills and expectations may exist between different communities.</p> <p>LPMT recommends that the RRC revise ¶(b)(1) to clarify that "competence" is to be assessed by reference to the particular locality in which a lawyer is practicing by adding the following language to the of the single sentence of this subparagraph: "...in the locality in which the legal services are provided."</p>	<p>The Commission disagrees with the proposed approach. The rule applies to all lawyers in California. If there are differences in the level of competence in different localities in California as suggested by these comments, the Commission has never been presented evidence of such differences.</p>
5	Zitrin, Richard (law professors group)	M	Yes	Comment [6]	<p>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," <u>no matter how egregious</u> that mistake may be. Section (a) of the rule remains unchanged: "A lawyer shall not <u>intentionally, recklessly, or repeatedly</u> 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 <u>single act</u> of negligent conduct <u>or a single mistake</u>" (Emphasis added.) "...seriously misguided."</p>	<p>The Commission disagrees with the suggestions in this comment. The proposed rule retains California's longstanding approach to regulation of competence. The Commission is informed that OCTC does, in fact, prosecute egregious incompetence. The proposed rule would maintain that capability since "recklessly" is believed to be synonymous with egregious incompetence.</p>

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					<p>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. .</p> <p>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.</p> <p>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 "</p>	
6	Office of Chief Trial Counsel	M	Yes		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.	The Commission has declined to recommend a rule on diligence.
7	COPRAC	A	Yes		Support as drafted.	No response required.

Rule 1.1 Competence
(Commission’s Proposed Rule – Clean Version)

- (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 the legal services are undertaken, the lawyer may nonetheless 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.

COMMENT

- [1] It is the duty of every lawyer to provide competent legal services to the client.
- [2] 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 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.

- [3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.
- [4] 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 or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.
- [5] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person. [See also Rule 6.2]
- [6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.

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