

# Proposed Rule 1.1 [RPC 3-110] Competence

(Draft #7, 6/18/07)

**Summary:** Proposed Rule 1.1 is a departure from the ABA Model Rule’s approach to regulating competence. The Commission decided to retain California’s disciplinary standard from current Rule 3-110. The current rule offers more public protection because the focus is on applying a lawyer’s legal knowledge, skill, and thoroughness as opposed to merely possessing those components. Also, the Model Rule could be interpreted to impose discipline for a single negligent act, contrary to existing California law.

## Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rule

RPC 3-110

Statute

Case law

Lewis v. State Bar (1981) 23 Cal.3d 683

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

---

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

---

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption   9    
Opposed Rule as Recommended for Adoption   3    
Abstain   1  

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart  Yes  No

---

## Stakeholders and Level of Controversy

---

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See Introduction and Public Comment Chart for the statement of the minority position and members of the public.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.1\* Competence

October 2009

(Draft rule revised following consideration of public comment.)

### *INTRODUCTION:*

Proposed Rule 1.1 is a departure from the ABA Model Rule's approach to regulating competence. The Commission decided to retain the California disciplinary standard in current rule 3-110 and not to adopt ABA Model Rule 1.1 for two reasons:

The Model Rule by its terms permits the professional discipline of a lawyer for an isolated act of simple negligence. The Commission believes the correct policy is as stated the Supreme Court in *Lewis v. State Bar* (1981) 23 Cal.3d 683, where the 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 addition, states that have adopted the substance of Model Rule 1.1 ordinarily do not impose discipline for a single act of negligence. Instead, the practice in most jurisdictions is closer to California's, resulting in an application of the rule to acts of gross or repeated negligence but not individual acts of simple negligence. That fact is hidden in Model Rule 1.1 and makes the rule misleading to lawyers and the public. Accordingly, the Commission determined that rather than hide that fact in a Comment or in disciplinary rulings that often remain confidential, the standard of the existing California rule should be retained.

---

\* Proposed Rule 1.1, Draft 7 (6/18/07).

*INTRODUCTION (Continued):*

*Minority.* A minority of the Commission disagrees with the Commission's decision to continue the current California approach to competence. The minority points out that the core provision of Model Rule 1.1 requiring a lawyer to provide competent legal services is the rule in 47 states and sets an appropriate public protection standard in providing for an unqualified duty of lawyer competence. Only California tolerates lawyer incompetence if it is not intentional, repeated, or reckless. The minority also notes that some jurisdictions include a comment that discipline cannot be imposed for single act of negligence and that the Commission's proposed comment [6] makes this point by stating that the rule is not intended to apply to "a single act of negligent conduct or a single mistake in a particular matter." The minority argues that by including proposed comment [6], the Commission majority should not be hesitant to adopt the language of Model Rule 1.1. The minority also argues that the current rule suggests to the California public that the legal profession in California tolerates incompetent legal services that do not involve intentional, reckless, or repeated acts. The minority also does not believe resort to a legal malpractice lawsuit is the appropriate default for what should be disciplinable incompetence. Lastly, the minority emphasizes the Commission's charge to foster a national standard and observes that lawyer competence is a foundational standard of professional responsibility that should not change when a lawyer crosses the California border.

<p align="center"><b>ABA Model Rule</b> <b>Rule 1.1 Competence</b></p>	<p align="center"><b>Commission's Proposed Rule*</b> <b>Rule 1.1 Competence</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation</p>	<p><del>A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation</del>  <u>(a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.</u></p>	<p>The proposed language of paragraph (a) is taken directly from current rule 3-110.</p> <p>Please see the Introduction for a discussion of the Commission's recommendation to retain current rule 3-110's approach and the position of a minority of the Commission to adopt the Model Rule.</p>
	<p><u>(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.</u></p>	<p>This language is taken verbatim from current rule 3-110(B) and is similar to the language of Model Rule 1.1, but adds the further public protections of requiring mental, emotional, and physical ability reasonably necessary for the performance of such service. The experience of members of the Commission, many of whom have represented other lawyers in legal malpractice and disciplinary actions in California, demonstrates that such further components are necessary to protect the public from incompetence resulting from alcohol and substance abuse, mental illness and physical infirmities. The language is also similar to the explanation of competence in Comment [1] of the proposed Rule.</p>

\* Proposed Rule 1.1, Draft 7 (6/18/07). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.1 Competence</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.1 Competence</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(c) <a href="#"><u>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.</u></a></p>	<p>Most of the language in paragraph (c) is taken directly from current rule 3-110(C), with some minor changes. As further client protection, the Commission has added the third alternative of referral to a competent lawyer. This language is similar to language in Comment [2] of Model Rule 1.1.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Legal Knowledge and Skill</b></p> <p>[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.</p>	<p><del><b>Legal Knowledge and Skill</b></del></p> <p><del>[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.</del></p> <p><u>[1] It is the duty of every lawyer to provide competent legal services to the client.</u></p>	<p>The Commission's proposed Comment [1] deviates from Model Rule 1.1 Comment [1] for two reasons. First, the Model Rule comment addresses the standard used in the Model Rule that focuses on a lawyer's possession of legal knowledge and skill. Thus, the Model Rule's emphasis is substantively different from the Commission's proposed Rule that focuses on a lawyer's use and application of that knowledge and skill in actually providing competent performance of legal services. See Introduction. Second, Model Rule 1.1 Comment [1] unnecessarily lengthens the rule by addressing generalized points that are more appropriate in a treatise than in a rule comment.</p>

\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.</p>	<p><del>[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.</del></p>	<p>The substance of Model Rule 1.1, cmt. [2], is already contained in current rule 3-311(C) and the Commission recommends retaining the concept in the black letter of the proposed Rule. Paragraph (c) of proposed Rule 1.1 is a slightly revised version of current rule 3-110(C) and provides:</p> <p align="center">(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.</p> <p>The Commission believes the above language effectively conveys the relevant guidance and that the inclusion of Model Rule 1.1, cmt. [2] would unnecessarily lengthen the proposed Rule without any significant additional benefit.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>NOTE: Below is comment [1] of <i>Model Rule 1.3 Diligence</i>.</b></p> <p>[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.</p>	<p><b>NOTE: The Comparison for proposed comment [2] is to comment [1] of <i>Model Rule 1.3 Diligence</i>.</b></p> <p><a href="#">[2] Competence under paragraph (b) includes the obligation to act with reasonable diligence on behalf of a client. A lawyer should pursue This includes pursuing a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever by taking lawful and ethical measures required to vindicate a advance the client's cause or endeavor objectives.</a></p> <p>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 <del>have authority to</del> exercise professional discretion in determining the means by which a matter should be pursued. See Rules <a href="#">[1.2]</a> and <a href="#">1.4</a>. 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.</p>	<p>This Comment includes language relating to diligence, a subject that is found in Model Rule 1.3 that the Commission has voted not to adopt since its subject is already contained in current rule 3-110 as an important component of competence. See rule 3-110(B). The Commission therefore recommends its retention in proposed Rule 1.1(b) instead of creating a separate rule on diligence. Finally, because the Commission is including the concept of diligence in its proposed Rule 1.1, the relevant language from Comment [1] of Model Rule 1.3, which the Commission believes provides valuable guidance, is adapted and added here.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[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.</a></p>	<p>This Comment makes it clear that a lawyer who accepts employment knowing he or she is not competent for the matter, and who does not expect to become competent is subject to discipline. The substance of this comment is not found in the comments to Model Rule 1.1. It adds further public protection by putting the lawyer on notice of the standard for accepting or continuing a matter regarding competence.</p>
<p>[3] 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, for ill-considered action under emergency conditions can jeopardize the client's interest.</p>	<p><del>[354]</del> 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, <del>for ill-considered action under emergency conditions can jeopardize the client's interest.</del></p>	<p>This Comment is substantially similar to Comment [3] of the ABA rule. The last clause was deleted as surplusage.</p>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 1.1 Competence</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 1.1 Competence</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.</p>	<p><del>[4]</del>[5] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This <a href="#">provision</a> applies <del>as well to</del> <a href="#">lawyers generally, including</a> a lawyer who is appointed as counsel for an unrepresented person. [See also Rule 6.2]</p>	<p>Comment [5] of the proposed Rule is a slight variation of Comment [4] to Model Rule 1.1. The slight change is to clarify that the concept of acquiring competence through reasonable preparation applies generally to all lawyers and not just lawyers appointed as counsel for a unrepresented person.</p> <p>The reference to Rule 6.2 has been placed in brackets pending the Commission's final recommendation concerning that Rule.</p>
<p><b>Thoroughness and Preparation</b></p> <p>[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).</p>	<p><del><b>Thoroughness and Preparation</b></del></p> <p><del>[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).</del></p>	<p>The Commission did not include this comment for the same reasons that the Commission did not include Model Rule 1.1, cmt. [1]. See Explanation of Changes for Comment [1], above.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.1 Competence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Maintaining Competence</b></p> <p>[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.</p>	<p><b>Maintaining Competence</b></p> <p><del>[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.</del></p>	<p>The Commission did not include Model Rule, cmt. [6], because California requires all of its actively-licensed lawyers to comply with Mandatory Continuing Legal Education requirements. See also Explanation of Changes for Comment [1], above.</p>
	<p><a href="#">[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.</a></p>	<p>This Comment succinctly reaffirms current California law, that is, current Rule 3-110 is not intended to subject a lawyer to discipline for a single negligent act. See Introduction, at ¶. 2.</p>
	<p><a href="#">[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.</a></p>	<p>This Comment is designed to point lawyers to related rules. The responsibilities of supervising lawyers are covered in current California rule 3-110, Discussion ¶. 1. Given the Commission's contemporaneous recommendation that California adopt Model Rules 5.1 to 5.3, which collectively address the respective responsibilities of supervising lawyers and subordinate lawyers and employees, the duty to supervise is more appropriately discussed in those Rules. Thus, it is necessary to cross-reference specific new rules on the responsibilities of supervisory lawyers.</p>

## Rule 1.1 Competence

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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] ~~This Rule requires that~~ it is the duty of every lawyer ~~act with reasonable diligence and promptness in representing~~ ato provide competent legal services to the client.
- [2] ~~The duties set forth in this Rule 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 [229 Cal.Rptr. 101, 714 P.2d 1239]; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [214 Cal.Rptr. 525, 695 P.2d 1066]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834, 685 P.2d 1185]; Crane v. State Bar (1981) 30~~

~~Cal.3d 117, 122 [177 Cal.Rptr. 670, 635 P.2d 163]; 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].— See also Rules 5.1 and 5.3.)~~

[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] 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.~~

[54] 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.

## Rule 3-110 Failing to Act Competently 1.1 Competence

(Comparison of the Current Proposed Rule to Current California Rule)

~~(A)(a)~~ A ~~member~~lawyer shall not intentionally, recklessly, 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~~lawyer may nonetheless ~~perform such services competently~~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.

### ~~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. 461; 396 P.2d 577].)~~

[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. ~~(Amended by order of Supreme Court, operative September 14, 1992.)~~

- [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.

**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.

## Rule 1.1: Competence

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**California:** Rule 3-110 (Failing to Act Competently) provides as follows:

(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.

**District of Columbia:** Rule 1.1(a) is identical to ABA Model Rule 1.1(b), but D.C. adds Rule 1.1(b), which states: "A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."

**Illinois** adds the following subparagraphs to Rule 1.1:

(b) A lawyer shall not represent a client in a legal matter in which the lawyer knows or reasonably should know that the lawyer is not competent to provide representation, without the association of another lawyer who is competent to provide such representation.

(c) After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's consent.

**Michigan:** Rule 1.1 retains some language from DR 6-101 of the ABA Model Code of Professional Responsibility.

**New Hampshire:** New Hampshire defines competence in detail, providing a long list of requirements that a lawyer must satisfy in order to achieve "legal competence."

**New Jersey:** Rule 1.1 provides that a lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

**New York:** DR 6-101 provides that a lawyer shall not:

(A) Handle a legal matter which the lawyer knows or should know that he is not competent to handle, without associating with a lawyer who is competent to handle it.

(B) Handle a legal matter without preparation adequate in the circumstances.

(C) Neglect a legal matter entrusted to the lawyer.

**Texas:** Rule 1.01 provides as follows:

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

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

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

(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.

**Rule 1.1 Competence.  
[Sorted by Commenter]**

**TOTAL = 9**    **Agree = 3**  
**Disagree = 1**  
**Modify = 5**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			The mere provision of case law string cites might not be the optimal guidance to provide in a rule comment.	Commission deleted Comment [2] that was primarily a long string cite of cases.
2	Feldman, Phillip	M			The departure from MR 1.1 is not the best public protection; the proposed rule creates loopholes for incompetent lawyers; the presence of repetitious misconduct should not be an element of the violation; the ABA approach has worked for the majority of states.	Commission disagreed and did not change its position in favor of the current California standard on competence.
3	Judge, Michael	M	Public Defender, Los Angeles County, California; Council of Chief Defenders; & California Public Defenders' Association		Public defender management should determine whether the office has the necessary time, knowledge and skill, rather than leaving it up to an individual deputy defender.  The Guidelines on Indigent Criminal Defense Delivery Systems address supervision issues by requiring an institutional Public Defender to ensure that all employees have the competence to handle the assigned cases; the rule should not be adopted or, if adopted, a Public Defender exemption should be added.	Partly in response to these issues, the Commission added a new Comment [7] clarifying the interrelationship between this rule and Rules 5.1 and 5.3 concerning supervision.

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

TOTAL = 9 Agree = 3  
Disagree = 1  
Modify = 5  
NI = 0

**Rule 1.1 Competence.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Lee, Richard Diebold	D			Commission should endorse the competence standard of MR 1.1 and should adopt all of the related ABA Comments; the much narrower California standard is too limited in requiring that an attorney's lack of competence be an intentional, reckless or repeated.	Commission disagreed and did not change its position in favor of the current California standard on competence.
5	Liederman, Peter H.	M			Comment [3] should be modified to acknowledge that sometimes a small or pro bono practitioner must decide if it is more ethical to continue representation without certainty as to competence rather than withdraw knowing a client will be unrepresented and helpless.	Commission disagreed and did not make the requested revision, in part, because the recommend change could be interpreted as creating an exception to the rule that is not recognized by either the Model Rule counterpart or the existing California rule.
6	Los Angeles County Bar Association	M			Comment [1] is problematic because it introduces a duty of promptness that is not stated anywhere in the rule; an unqualified duty of promptness may not be in best interest of clients.	Commission agreed and revised the relevant comment language to delete the unqualified reference to a requirement that a lawyer act with promptness in representing clients.
7	Orange County Bar Association	A			Support as drafted.	No action needed.
8	Poll, Edward	M			Competency should include technological competency.	Commission disagreed and did not make the requested revision, in part, because the Commission believes that a lawyer's possession of relevant technological knowledge is already covered by the rule's definition of competence and by the rule's provision for allowing a lawyer to acquire sufficient learning and skill in the course of a representation.

TOTAL = 9  
 Agree = 3  
 Disagree = 1  
 Modify = 5  
 NI = 0

**Rule 1.1 Competence.  
 [Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	San Diego County Bar Association	A			Majority = support as drafted. Dissent = paragraph (a) should be deleted; and paragraph (b) should be modified to include the concept of "loyalty".	Majority – no action needed. 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)