

Rule 1.3 Diligence

(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 act with reasonable* diligence in representing a client.
- (b) For purposes of this Rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer.

Comment

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

[2] See Rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.3
(See Current Rule 3-110(B))
Diligence

EXECUTIVE SUMMARY

In connection with the consideration of current rule 3-110 (Failure to Act Competently), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 1.3 (Diligence) and relevant California disciplinary case law concerning the issue of diligence. The evaluation was made with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Although the proposed rule has no direct counterpart in the current California rules, the concept of diligence is found in current rule 3-110 as a part of a lawyer’s duty of competent representation.¹ The result of the evaluation is proposed rule 1.3 (Diligence). 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.

Two main issues were considered in drafting proposed rule 1.3. The first issue was the threshold question of whether to retain diligence as a part of competence or move it to a standalone rule. The second issue was whether a specific duty of “promptness” should be included with a standalone rule on diligence.

Regarding the first issue, as of the 1983 amendments to the rules, the rule on failing to act competently has included a definition of competence that imposes an express duty of diligence in a lawyer’s performance of legal services. Rule 3-110(B) states:

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.

This standard has been routinely used by the State Bar Court in finding culpability for a competence violation when a lawyer possessed requisite knowledge and skills but nevertheless failed to perform services in a diligent manner.² (See, for example, *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377 and *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684.)

Although there is no deficiency in California law impairing the prosecution of disciplinary actions for lawyer misconduct involving diligence, the Commission is recommending that the concept of diligence be moved to a separate, standalone rule. This recommendation furthers that part of the Commission’s Charter encouraging the Commission to consider proposed rule amendments that eliminate “unnecessary differences between California’s rules and the rules used by a

¹ A separate executive summary is provided for the Commission’s proposed amendments to rule 3-110. See the summary of proposed rule 1.1 (Competence).

² Similar to the current California rule, the Restatement 3d of the Law Governing Lawyers, § 16, Reporter’s Note to Comment *d* treats diligence as being a component of competence and not a separate duty.

preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard³ with respect to professional responsibility issues whenever possible." In addition to furthering the national uniformity goal of the Commission's Charter, proposed rule 1.3 would enhance respect for and confidence in the legal profession by highlighting the concept of diligence as a key professional responsibility, rather than subsuming it within the competence rule. "Perhaps no professional shortcoming is more widely resented than procrastination Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." Model Rule 1.3, comment [3].

Regarding the second issue of a specific duty of "promptness," the Commission is recommending that "promptness" not be included in proposed rule 1.3. The Commission believes that the combination of separate rules on competence and diligence adequately guards against the misconduct that is intended to be prohibited. Including the concept of "promptness" might lead to confusion when a lawyer is charged with both failing to act competently and failing to perform diligently. It is not clear what the concept of "promptness" adds if there are separate rules on competence and diligence. Most significantly, there are other rules that by their own terms already include a timing requirement of prompt compliance. As just two examples: (1) rule 3-500 (Communication) requires "promptly complying with reasonable requests for information" from a client; and (2) rule 3-700 (Termination of Employment) requires that upon termination of a client's representation, a lawyer must "[p]romptly refund any part of a fee paid in advance that has not been earned." The overlay of an across-the-board requirement of "promptness" would be redundant in the case of these rules and other rules that include their own timing requirement.

In addition to these two main issues, other proposed amendments include the following.

- In paragraph (a), clarifying that the prohibition concerning diligence is aligned with the longstanding standard on competence by specifically formulating the prohibition to provide that a lawyer shall not "intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable diligence."
- In paragraph (b), adding to the Model Rule's definition of "reasonable diligence," the qualification that a lawyer act "with commitment and dedication to the interest of the client."
- In Comment [1], providing a cross reference to a lawyer's duty to supervise in proposed rules 5.1 and 5.3.
- In Comment [2], providing a cross reference to the competence rule, proposed rule 1.1.

National Background – Adoption of Model Rule 1.3

As California does not presently have a direct counterpart to Model Rule 1.3, this section reports on the adoption of the Model Rule in United States' jurisdictions.

³ Every jurisdiction, except California, has adopted Model Rule 1.3, has a variant of the rule that treats the duty of diligence separate and distinct from the duty of competence, or addresses diligence as a separate duty in its competence rule (Texas).

Illinois Rule 1.3 Diligence

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

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

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf

Thirty-nine states have adopted Model Rule 1.3 verbatim.⁴ Seven jurisdictions have adopted a slightly modified version of Model Rule 1.3.⁵ Two states have adopted a version of the rule that is substantially different to Model Rule 1.3.⁶

⁴ The forty-two states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁵ The seven jurisdictions are: Alabama, District of Columbia, Georgia, Massachusetts, New York, Oregon, and Virginia.

⁶ The two states are: California and Texas.

Rule 1.3 Diligence
(Redline Comparison of the Proposed Rule to ABA Model Rule)

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- (b) For purposes of this Rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or without just cause, unduly delay a legal matter entrusted to the lawyer.

Comment

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

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

~~[2] A lawyer’s work load must be controlled so that each matter can be handled competently~~See Rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

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

~~[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer~~

~~relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.~~

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