

New Rules on Competence and Communication

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La Jolla Bar Association

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1. New California Rules of Professional Conduct Generally

- a. Effective November 1, 2019, by California Supreme Court order dated May 17, 2019.
- b. Binding on all California lawyers pursuant to Bus. & Prof. Code section 6077.
- c. Adopted American Bar Association Model Rules numbering system and many Model Rules **but...**
- d. Differs significantly from Model Rules in many aspects (“a California engine in an Model Rules chassis.”)
- e. More to learn: New Rules: 60 pages; Old Rules: 33 pages.

2. New Rule 1.1 Competence (old Rule 3-110(A))

- a. Like old rule, does authorize discipline for “simple negligence”
- b. Adds “gross negligence” to “intentional, reckless or ... repeated conduct”
- c. Retains California definition of “competence”: . “application of (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.”
- d. Retains California rule on acquisition of competence after retention by (1) associating the competence counsel or (2) acquiring sufficient learning and skill or (3) referring the matter to other counsel.

3. New Rule 1.2 Scope of Employment and Allocation of Authority (no prior California Rule)

- a. Defines roles of client and lawyer.
 - i. Client’s sphere: objectives of representation.
 - ii. Lawyer’s sphere: means of achieving objectives.
- b. Client has absolute right to settle case
- c. Scope of representation can be limited if reasonable with informed client consent.
- d. Comment 3: representation of client not “an endorsement of the client’s political, economic, social or moral views or activities.”

4. New Rule 1.2.1 Advising Violation of the Law (former California Rule 3-120)

- a. Cannot advise client to violate the law.
- b. Can advise clients on consequences of violating the law.
- c. Comment to Rule 1.2.1 redrafted at California Supreme Court’s request: “Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal

law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4)"

- d. Cannabis industry lawyers.

5. New Rule 1.3 Diligence (no prior California rule)

- a. Diligence formerly considered part of duty of competence.
- b. Same standard as Rule 1.1. "intention, repeated, reckless or grossly negligent"
- c. Diligence defined: "commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer."

6. Rule 1.4 Communication (former California Rule 3-500/Bus. & Code §6068(m))

- a. Duty to keep clients informed of significant developments.
- b. Duty to respond to reasonably status inquiries.
- c. **New:** duty to consult with client regarding means to achieve objectives (see Rule 1.2).
- d. **New:** duty to inform client of relevant limitations on lawyer's conduct where client expects assistance not allowed under the Rules of Professional Conduct.
- e. Examples of relevant limitations:
 - i. Competence – lack of learning or skill (Rule 1.1(b)(1)).
 - ii. Competence – lack of mental, physical, emotional ability (Rule 1.1(b)(2)).
 - iii. Advising violation of the law (Rule 1.2.1).
 - iv. Prohibited contingent fees (Rule 1.5(c)(1): family law case, Rule 1.5(c)(2) criminal case).
 - v. Confidentiality (Rule 1.6)
 - vi. Joint Representation (Rule 1.7)
 - vii. Business transaction with client (Rule 1.8)
 - viii. Successive representation (Rule 1.9)
 - ix. Lawyer as former judge in same matter (Rule 1.12)
 - x. Lawyer for organization (Rule 1.13)
 - xi. Representation for improper purpose (Rule 1.16(a))
 - xii. Conflict with prospective party (Rule 1.18)
 - xiii. Meritless claims (Rule 3.1)
 - xiv. Delay of litigation (Rule 3.2)
 - xv. False testimony (Rule 3.3)
 - xvi. Lawyer as witness (Rule 3.7)
 - xvii. Inadvertently transmitted writings (Rule 4.4)

xviii. Unauthorized practice of law (Rule 5.5)

7. Rule 5.1 Duties of Supervising/Managing Lawyers (no prior California Rule)

- a. Must take reasonable measures to ensure all firm lawyers comply with Rules and State Bar Act
- b. Managing or supervising lawyers liable for subordinate lawyer's violation if conduct ordered, ratified or fails to take reasonable remedial measures when conduct could be mitigated.

8. Rule 5.2 Responsibilities of Subordinate Lawyers (no prior California Rule)

- a. Subordinate culpable if he or she acts at managing or supervising lawyers direction – no 'Nuremberg' defense
- b. Not culpable if acting on a superior lawyer's "reasonable resolution" of an arguable question of duty.

9. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants (no prior California Rule)

- a. Managing and supervising lawyers must take reasonable measures to ensure all firm non-lawyer assistants actions are 'compatible' with the lawyers' professional obligations.
- b. Managing or supervising lawyers liable for non-lawyer assistant's violation as if they were a lawyer, if the conduct ordered, ratified or fails to take reasonable remedial measures when conduct could be mitigated.

Your Presenter

David Cameron Carr is an attorney in private practice in San Diego, California. Since 2001 he has specialized in representing attorneys in matters involving legal ethics and the law of lawyering, including discipline defense, bar admissions, attorney fee disputes, legal malpractice, attorney professional responsibility and ethics advice.

Mr. Carr graduated from Loyola Law School in 1986 and was admitted to the California Bar that year. After practicing in business litigation and commercial law, Mr. Carr spent 12 years as staff attorney, discipline prosecutor and manager at the State Bar of California, before returning to private practice in 2001.

He is an active member of the San Diego County Bar Association, where he serves on the Legal Ethics Committee, the Association of Professional Responsibility Lawyers, the Association of Discipline Defense Counsel, where he served as President 2008-2010 and the American Bar Association, Center for Professional Responsibility. Mr. Carr is a member of the State Bar of California Standing Committee on Professional Responsibility and Conduct (2018-2021). He also teaches professional responsibility as an adjunct professor at Thomas Jefferson School of Law in San Diego.

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