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SPECIAL COVERAGE

PROPOSED RULES OF PROFESSIONAL CONDUCT

PROPOSED RULES 1.1 & 1.3 **Competence and (introducing) diligence**

By Richard Zitrin

Since 1989, the California ethics rule on competence has read, “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” A simple enough statement.

The original Commission on the Revision of the Rules left this language intact. But this first commission added Comment, paragraph 6, which stated that the rule is “not intended to apply to a single act of negligent conduct or a single mistake.” (My emphasis.) That addition gave lawyers a “free pass” to anyone committing a first act of negligence, or first “mistake,” in the jargon of the first commission, *no matter how egregious* that mistake was. This modification was itself a big mistake.

Fortunately, our Supreme Court rejected the first commission’s work product in its entirety, which led to the formation of a second Rules Revision Commission far more concerned with the public interest than the first. This commission removed the offending paragraph in the comment section, and added the phrase “with gross negligence” to section (a) of the rule. This is a great improvement over the first commission’s lawyer-protective language, and the addition of “gross negligence” further clarifies and slightly broadens the categories of possible incompetence.

Perhaps more importantly, if the

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court accepts the bar’s recommendation, for the first time, California will have a diligence rule. Diligence and competence are not the same thing. Far from it. “Competence” refers to the ability to take on and complete a matter with the requisite skill and knowledge. “Diligence,” on the other hand, refers to getting the job done, doing the work. A lawyer can be highly competent, but an attorney’s lack of diligence — missing deadlines, dropping the ball, and general inattentiveness or lack of caring — is a far more frequent sin.

The first commission completely refused to draft a diligence rule, the majority of members arguing that the one-word reference in existing competence Rule 3-110(b) — “For purposes of this rule, ‘competence’ in any legal service shall mean to apply the 1) diligence, 2) learning and skill, [etc.]” was sufficient. But the word itself was left undefined.

With the current draft rules, the use of the word “diligence” to help define “competence” has rightly been removed from Rule 1.1(b), and an entire rule, defining diligence, numbered 1.3, has been created:

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross

negligence 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 unduly delay a legal matter entrusted to the lawyer.

Clearer, fairer, more complete — and far more protective of clients and the public. The second commission should be applauded for making these two rules changes.

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