

O BROTHER, WHERE ART THOU?
Mentoring in Hard Times
Anthony M. Kennedy Inn of Court, Team 8
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California Rules of Professional Conduct

Rule 1-120 Assisting, Soliciting, or Inducing Violations

A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

Rule 3-110 Failing to Act Competently

(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.

Discussion:

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. 161; 396 P.2d 577].)

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 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.)

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

American Bar Association Model Rules of Professional Conduct

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1 Competence - Comment

Legal Knowledge and Skill

[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.

[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.

[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.

[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.

Thoroughness and Preparation

[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).

Maintaining Competence

[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.

Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2 Responsibilities Of A Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Case Law

Ctr. Found. v. Chi. Ins. Co., 227 Cal. App. 3d 547, 557 n.7 (1991) - "A lawyer may be disciplined for representing a client in a field in which the attorney has no experience and without associating or consulting a sufficiently experienced attorney."

In re Dempsey, 632 F. Supp. 908, 921 (N.D. Cal. 1986) - The court disciplined an attorney who was inexperienced in federal criminal procedures on the grounds that he had a duty to associate with knowledgeable counsel or obtain advice from competent counsel.

Gadda v. State Bar, 50 Cal. 3d 344, 353-54, 787 P.2d 95, 100 (1990) – The California Supreme Court, en banc, observed: “Former rule 6–101, as well as its revised counterpart (rule 3–110), recognizes that some attorneys, especially those newly admitted to the bar, may not have sufficient learning and skill to act competently on their own. These rules, therefore, encourage such unskilled lawyers to associate with, and be supervised by, other competent attorneys. The State Bar determined petitioner violated this duty of supervision by not taking responsibility for Pineda's actions and by assigning him to conduct a hearing he was unqualified to handle without supervision. [“Pineda worked in petitioner's office as an ‘independent contractor,’ having been admitted to the bar less than four months previously.”] This duty of supervision is separate and distinct from the underlying duties of a novice attorney to act competently....”

Crane v. State Bar, 30 Cal. 3d 117, 122-23, 635 P.2d 163, 165 (1981) – “An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority.”

Mentoring Across the United States

List from the ABA of all known state mentoring programs:

http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html

Alameda County mentoring program:

<http://www.calbar.ca.gov/portals/0/documents/cyla/CYLA-Mentor-Programs.pdf>

Alabama (discontinued):

<http://www.alabar.org/mentoring/>

Georgia:

The four central features of the program are:

- (1) Every beginning lawyer will be assigned a mentor for the first year of law practice.
- (2) A new CLE program called Enhanced Bridge-the-Gap will emphasize lawyering skills as well as the lawyer's relationships with clients, other lawyers, the courts, and the public.

(3) The CLE curriculum will lay the groundwork for the activities and discussions between the mentor and beginning lawyer about the basic precepts of law practice, practical skills, and ethical and professionalism norms.

(4) Each mentor and beginning lawyer will develop a Mentoring Plan tailored to their circumstances. It can be integrated into a training program that a law firm or organization may already have in place. The Mentoring Plan is to be completed in the first year after admission to the Bar.

http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/mentoring/

Idaho:

The Idaho State Bar has developed a mentoring program to assist new lawyers in the transition from law school to a successful law practice. The program will pair a new lawyer with an experienced lawyer in their local community. The experienced lawyer mentors have agreed to respond to general questions from the new lawyers and to give suggestions and offer guidance where appropriate about the practical aspects of practicing law.

http://isb.idaho.gov/member_services/mentor_program.html

Illinois:

The ISBA proudly supports mentoring and acknowledges the value of having experienced lawyers provide professional guidance and share practical knowledge with new lawyers during the critical transition from law student to legal practitioner.

<http://www.isba.org/mentoring>

Indiana:

The purpose of the program is to elevate the competence, professionalism, and success of Indiana lawyers through positive mentoring relationships. Mentoring creates an opportunity for an experienced lawyer to provide professional guidance and share practical knowledge and skills with a new lawyer during the critical transition from law student to legal practitioner.

Specifically, the mentoring relationship should foster the development of the new lawyer's practical skills and increase his or her knowledge of legal customs; contribute to a sense of integrity in the legal profession; promote collegial relationships among legal professionals and involvement in the organized bar; improve legal ability and professional judgment; and encourage the use of best practices and highest ideals in the practice of law. Mentoring works on several different levels to foster the development of a new lawyer's career while creating a sense of pride and purpose in the mentor.

<http://www.inbar.org/ISBALinks/MentorMatch/tabid/382/Default.aspx>

Maryland:

http://www.msba.org/mysba/login.asp?a=3&r=/sec_comm/mentor/Default.asp

Nevada:

The first years of a lawyer's practice are a critical time in the development of professional habits, practices and character. To foster this transition newly admitted attorneys with less than five years' experience will participate in *Transitioning into Practice (TIP): A Mentor Program for Nevada Attorneys*. TIP is designed to provide transitional support to newly admitted attorneys as

they enter practice. The program is not intended to provide substantive advice or training in the practice of law.

<http://www.nvbar.org/tip>

New Mexico:

When the program is completed, both mentors and new lawyers received MCLE credits. By facilitating relationships between new and more experienced lawyers, Bridge the Gap hopes to enhance professionalism, ethics, civility, practical skills and relationships in the legal profession.

<http://www.nmbar.org/attorneys/mentorship/mentorship.html>

Ohio:

Lawyer to Lawyer Mentoring links experienced attorneys with new lawyers who have recently been admitted to the practice of law. Mentoring is a one-on-one relationship designed to assist new lawyers as they begin their legal careers. Mentors and new lawyers meet in person six times during the course of a year to discuss topics and engage in activities they select from a mentoring plan. Upon completion of the program, mentors receive CLE credit and new lawyers receive required new lawyer training credit. By fostering positive mentoring relationships, Lawyer to Lawyer Mentoring seeks to elevate the competence, professionalism, and success of Ohio lawyers.

<http://www.sconet.state.oh.us/AttySvc/mentoring/>

Oregon:

The Oregon State Bar launched the New Lawyer Mentoring Program for incoming bar members in May of 2011. This mandatory program formalizes a process that for many decades took place organically, through connections forged at law firms and other close-knit bar communities. As our state bar has grown, the process of introducing new lawyers to the legal community, and guiding them through the transition to law practice, has grown more amorphous. The NLMP offers new bar members one-on-one guidance on elements of a highly competent practice, while promoting the professionalism, civility and collegiality that make Oregon among the best places in the country to practice law.

<http://www.osbar.org/programs/mentoring>

<http://oregonlawpracticemanagement.com/2011/04/15/new-lawyer-mentoring-program/>

Texas:

[http://www.texasbar.com/AM/Template.cfm?Section=Model Policies and Mentoring Programs](http://www.texasbar.com/AM/Template.cfm?Section=Model_Policies_and_Mentoring_Programs)

Utah (required!):

The Utah Supreme Court has approved a New Lawyer Training Program ("NLTP"). The goal of the Utah NLTP is to match new lawyers with more experienced lawyers for training during their first year of practice in professionalism, ethics, and civility; to assist new lawyers in acquiring the practical skills and judgment necessary to practice in a highly competent manner; and to provide a means for all Utah attorneys to learn the importance of organizational mentoring, including the building of developmental networks and long-term, multiple mentoring relationships.

<http://www.utahbar.org/nltp/>

Other Information

- "A Graduate's Legacy: On the Importance of Mentoring," *Hastings Community*, Summer, 1999.
- Abbott, Ida, *The Lawyer's Guide to Mentoring*, National Association for Law Placement (NALP), Washington, D.C., 2000.
- Abbott, Ida, "Mentoring Plays a Key Role in Retaining Attorneys of Color," *Law Governance Review*, Spring, 1998.
- Bass, Patricia W., "Law School Enrollment and Employment for Women and People of Color," *Diversity & The Bar*, Minority Corporate Counsel Association, August, 1999.
- Butler, Timothy, and Waldroop, James, "Job Sculpting: The Art of Retaining Your Best People," *Harvard Business Review*, September-October, 1999.
- Calkins, Lynn E., "Group Mentoring Lawyers in the Firm's Sweet Spot," *Litigation*, Vol. 36, No. 1, Fall 2009.
- Catalyst, "Women of Color in Corporate Management: Opportunities and Barriers," New York, 1999.
- Catalyst, *Advancing Women in Business: The Catalyst Guide*, Jossey-Bass Publishers, San Francisco, 1998.
- Catalyst, "Women in Corporate Leadership: Progress and Prospects," New York, 1996.
- Catalyst, "Mentoring: A Guide to Corporate Programs and Practices," New York, 1993.
- Chao, Georgia T., and Gardner, Philip. D., "Formal and Informal Mentorships: A Comparison on [sic] Mentoring Functions and Contrast with Nonmentored Counterparts," *Personnel Psychology*, 45, 1992.
- Daloz, Laurent A., *Mentor: Guiding the Journey of Adult Mentors*, Jossey-Bass Publishers, San Francisco, 1999.
- "Diversity in the Executive Suite: Creating Successful Career Paths and Strategies," Korn/Ferry International, in conjunction with Columbia Business School, 1998.
- Dreher, George F., and Ash, Ronald A., "A Comparative Study of Mentoring Among Men and Women in Managerial, Professional, and Technical Positions," *Journal of Applied Psychology*, Vol. 75, No. 5, 1990.
- "1999 Emerging Work Force Study," Interim Services Inc. and Louis Harris Associates, 1999.
- Facing the Grail: Confronting the Cost of Work-Family Imbalance*, Boston Bar Association, 1999.
- Hallowell, Edward, "The Human Moment at Work," *Harvard Business Review*, January-February, 1999.
- Herzberg, Frederick, "One More Time: How Do You Motivate Employees?," *Harvard Business Review*, September-October, 1987.
- Hill, Linda A., *Becoming a Manager. Mastery of a New Identity*, Penguin Books, New York, 1993,
- Kanter, Rosabeth Moss, *Men and Women of the Corporation*, Basic Books, New York, 1977.
- Keeping the Keepers: Strategies for Associate Retention in Times of Attrition*, National Association for Law Placement (NALP) Foundation for Research and Education, Washington, D.C., 1998.
- Kelley, Robert E., *How to Be a Star at Work*, Random House, New York, 1998.
- Kram, Kathy, *Mentoring at Work*, Scott Foresman & Co., Glenview, Illinois, 1985.
- Lindsey, Jonathan, and Eichbaum, June, "Lateral Partner Satisfaction," Major, Hagen & Africa,

1997.

- Loeb, Marshall, "The New Mentoring," *Fortune Magazine*, November 27, 1995, p. 213.
- McCall, Morgan W., Jr., Lombardo, Michael M., and Morrison, Ann M., *The Lessons of Experience*, The Free Press, New York, 1988.
- Mullen, Ellen J., "Vocational and Psychosocial Mentoring Functions: Identifying Mentors Who Serve Both," *Human Resources Development Quarterly*, Vol. 9, No. 4, Winter, 1998.
- Murray, Margo, *Beyond the Myths and Magic of Mentoring*, Jossey-Bass Publishers, San Francisco, 1991.
- Ohlott, P. J., and Hughes-James, M. W., "Single-Gender and Single-Race Leadership Development Programs," *Leadership in Action*, Center for Creative Leadership and Jossey-Bass Publishers, Vol. 17, No. 4, 1997
- Perceptions of Partnership: The Allure & Accessibility of the Brass Ring*, National Association for Law Placement (NALP) Foundation for Research and Education, Washington, D.C., 1999.
- Phillips-Jones, Linda, "The Mentor's Guide," 1998.
- Pigott, Jane, and Nowlan, Stephen E., "Success Strategies from Women at the Top," *Diversity & The Bar*, Minority Corporate Counsel Association, August, 1999.
- Ragins, Belle Rose, "Diversified Mentoring Relationships in Organizations: A Power Perspective," *Academy of Management Review*, Vol. 22, No. 2, 1997.
- Ruderman, M. N., Ohlott, P. J., Panzer, K., and King, S. N., "How Managers View Success: Perspectives of High Achieving Women," *Leadership in Action*, Center for Creative Leadership and Jossey-Bass Publishers, Vol. 18, No. 6, 1999.
- Scandura, Terri A., "Mentorship and Career Mobility: An Empirical Investigation," *Journal of Organizational Behavior*, Vol. 13, 1992.
- Scandura, Terri A., "Mentoring: The Key to Career Success," American Woman's Society of Certified Public Accountants, 1992.
- Schiltz, Patrick J., "On Being Happy, Healthy, and Ethical," *Vanderbilt Law Review*, May, 1999.
- Segal, David, "What They Don't Teach Law Students: Lawyering," *The New York Times*, November 19, 2011.
- Stephenson, Karen, "Diversity: A Managerial Paradox," *Clinical Sociology Review*, 1994.
- Thomas, David A., and Gabarro, John J., *Breaking Through: The Making Of Minority Executives in Corporate America*, Harvard Business School Press, 1999.
- Vorro, Alex, "Mentoring Helps Attorneys At All Levels Advance Their Careers," *InsideCounsel Magazine*, April 2012.
- Wilkins, David, "Why Are There So Few Black Lawyers?," *California Law Review*, Vol. 84, 1996.

Ethics within the mentor/mentee relationship from the Institute for Clinical Research Education (University of Pittsburgh):

<http://www.icre.pitt.edu/mentoring/ethics.html>

May 1, 2012 New York Times article reporting that beginning in 2013, prospective lawyers will be required to perform 50 hours of pro bono legal services before they are approved to practice law:

http://www.nytimes.com/2012/05/02/opinion/a-new-lawYERS-duty.html?_r=2&partner=rssnyt&emc=rss

May 2012 California Bar Journal message from the President of the State Bar about the task force studying the proposal for a pre-admission practical skills training requirement for all new lawyers. The message includes comments about the tradition of mentoring and the role of mentoring in defining the legal profession:

<http://www.calbarjournal.com/May2012/Opinion/FromthePresident.aspx>

If you would like to sign up to be an informal mentor for current McGeorge students, contact Sarra Ziari (sziari@pacific.edu) in the Career Development Office.