Ann. Mod. Rules Prof. Cond. § 1.1

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Ellen J. Bennett, Helen W. Gunnarsson and Nancy G. Kisicki, Center for Professional Responsibility

American Bar Association

CLIENT-LAWYER RELATIONSHIP

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.

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 6.2Rule 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).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2Rules 1.2 (allocation of authority), 1.41.4 (communication with client), 1.5(e) (fee sharing), 1.61.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Definitional Cross-References

"Reasonably" *See* Rule 1.0(h)

State Rules Comparison

http://ambar.org/MRPCStateCharts

ANNOTATION

INTRODUCTION

Competence was not an explicit ethical requirement until after 1970, when jurisdictions began adopting versions of the ABA Model Code of Professional Responsibility. Model Code DR 6-101(A) (Failing to Act Competently) (1969). Although the Model Code required competence, it did not define it, and so disciplinary agencies assessing adequacy of representation relied principally upon DR 6-101(A)(3) (forbidding neglect) and DR 6-101(A)(2) (requiring adequate preparation). *See In re Cohn*, 600 N.Y.S.2d 501 (App. Div. 1993) (neglect may be considered a species of failure to act competently; applying state's Code). Rule 1.1, in contrast, now defines competence by breaking it into four ingredients--knowledge, skill, thoroughness, and preparation.

• 2012 Amendments

The comment was amended in 2012 to add paragraphs [6] and [7] under a new header, Retaining or Contracting With Other Lawyers. Former paragraph [6] was renumbered to paragraph [8], and language was added to make explicit that a lawyer's duty of competence includes keeping abreast of the benefits and risks associated with relevant technology. *See* American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 43 (2013).

KNOWLEDGE

• Legal Principles

A lawyer is expected to be familiar with well-settled principles of law applicable to a client's needs. *See People ex rel. Goldberg v. Gordon*, 607 P.2d 995 (Colo. 1980) (treating corporation as tenancy in common among shareholders, then using probate proceeding to transfer joint-tenancy assets, demonstrated "total lack of understanding of fundamental principles essential to the practice of law"); *Fla. Bar v. Lecznar*, 690 So. 2d 1284 (Fla. 1997) (failure to name insurance company as defendant in personal injury suit within statutory time limit indicated failure to understand relevant legal doctrines or procedures); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000) (failure to carry out essential adoption procedures); *In re Hult*, 410 P.3d 879 (Kan. 2018) (lawyer representing immigration client lacked sufficient knowledge of relevant law or procedure); *Att'y Grievance Comm'n of Md. v. Maiden*, 279 A.3d 940 (Md. 2022) (lawyer both created and failed to recognize conflict of interest with client); *Commonwealth v. McDaniels*, 785 A.2d 120 (Pa. Super. Ct. 2001) (brief grossly misstated client's crimes and relevant standard for withdrawal from representation); *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (erroneously believing statute of limitations in medical malpractice case would not run until after obtaining opinion by client's treating physician that malpractice occurred); *Martin v. Nw. Wash. Legal Servs.*, 717 P.2d 779 (Wash. Ct. App. 1986) (failing to inquire about, discuss, or seek division of client's husband's military pension in marriage dissolution). *But see* *In re Yelverton*, 105 A.3d 413 (D.C. 2014) (lawyer for witness in criminal trial pursued "legally unfounded strategy," including filing motion for mistrial without standing and with no chance of success, but court declined to find violation of Rule 1.1 because actions were "sincerely undertaken for the purpose of protecting his client" and caused no harm). *See generally* Christopher Sabis & Daniel Webert, *Understanding the "Knowledge" Element of Attorney Competence: A Roadmap for Novice Attorneys*, 15 Geo. J. Legal Ethics 915 (Summer 2002).

• Basic Research

A lawyer must be able to ascertain applicable rules of law, whether or not commonly known or settled, using standard research sources. *See* *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (criminal defense lawyer "did no legal research" on client's case); *Att'y Grievance Comm'n v. Sperling*, 69 A.3d 478 (Md. 2013) ("decision to do nothing promptly" on learning of case's dismissal violated duty of competence); *Att'y Grievance Comm'n v. James*, 870 A.2d 229 (Md. 2005) (failure to do "even cursory research" regarding viability of claim); *In re Disciplinary Action Against McCloud*, 955 N.W.2d 270 (Minn. 2021) (instructing client not to appear at pretrial hearing without advising of, or knowing, consequences); *State ex rel. Okla. Bar Ass'n v. Hensley*, 661 P.2d 527 (Okla. 1983) (intestacy laws not "peculiar to probate law" but "basic" and "readily ascertainable upon minimal research"); *In re Norton*, 857 S.E.2d 1 (S.C. 2021) (failure to file suit because lawyer did not know where to file it); *In re Young*, 639 S.E.2d 674 (S.C. 2007) (filing RICO counterclaim in answer to adversaries' suit without researching state predicate offenses upon which claim was based); *In re Taylor*, 60 V.I. 356 (V.I. 2014) (failure to do any research before advising immigration client). *See generally* Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 Geo. J. Legal Ethics 607 (Summer 2000); Ellie Margolis, *Surfin' Safari--Why Competent Lawyers Should Research on the Web*, 10 Yale J.L. & Tech. 82 (Fall 2007).

• Procedure

A lawyer is required to know and follow all applicable rules of procedure. *See In re Gluck*, 114 F. Supp. 3d 57 (E.D.N.Y. 2015) (repeated failure to comply with deadlines or appear at pretrial conferences); *In re Steinberg*, 33 Vet. App. 291 (Court of Appeals for Veterans Claims 2020) (failure to respond to or comply with court orders); *People v. Beecher*, 350 P.3d 310 (Colo. O.P.D.J. 2014) (telling client not to appear at pretrial conference); *Burton v. Mottolese*, 835 A.2d 998 (Conn. 2003) (failure to stop speaking when objection was made); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Beauvais*, 948 N.W.2d 505 (Iowa 2020) (failure to secure expert and to conduct proper discovery in complex toxic tort case); *Ky. Bar Ass'n v. Trumbo*, 17 S.W.3d 856 (Ky. 2000) (filing defective separation agreement without proper notarization of husband's signature; decree of dissolution later set aside); *In re Abadie*, 320 So. 3d 1073 (La. 2021) (failure to understand and follow court procedures; multiple procedural errors rose to level of incompetency); *Att'y Grievance Comm'n of Md. v. Silbiger*, 276 A.3d 53 (Md. 2022) (failure to properly maintain records of client and third party funds); *Ryan v. Ryan*, 677 N.W.2d 899 (Mich. Ct. App. 2004) (filing of complaint

without required verification or supporting affidavits); *In re Fru*, 829 N.W.2d 379 (Minn. 2013) (persistent failure to comply with immigration court orders and procedures over eight years was pattern of incompetence); *In re Gallegos*, 723 P.2d 967 (N.M. 1986) (lawyer did not apply for supersedeas bond to protect property during appeal, telling judge he "really had no idea how to proceed"); *In re Howe*, 843 N.W.2d 325 (N.D. 2014) (failing to comply with immigration court filing requirements); *In re Obert*, 282 P.3d 825 (Or. 2012) (filing untimely motions and notices and failing to follow explicit instructions from court was "pattern of ignorance of the most basic of applicable rules"); *In re Laprath*, 670 N.W.2d 41 (S.D. 2003) (demonstrating lack of understanding of basic legal procedure in multiple client matters and pro se defense to disciplinary complaint); *In re Winkel*, 577 N.W.2d 9 (Wis. 1998) (failing to have client execute disclaimer required under father's trust, resulting in greater tax liability for estate).

• ***Court Rules***

Violation of court rules may also constitute lack of competence under Rule 1.1. *See, e.g., Mendez v. Draham*, 182 F. Supp. 2d 430 (D.N.J. 2002) (repeated admonitions under Federal Rule of Civil Procedure 11 cast doubt on lawyer's continuing compliance with Rule 1.1, warranting referral to district chief judge for discipline); *In re McCord*, 722 N.E.2d 820 (Ind. 2000) (representing client before U.S. circuit court without being admitted to that court, misapplying rules governing federal appellate practice, and repeatedly failing to comply with procedural requirements); *In re Harris*, 180 P.3d 558 (Kan. 2008) (promising client to file bankruptcy matter immediately but failing to obtain electronic filing account, thereby violating court's mandatory electronic filing rule); *Att'y Grievance Comm'n of Md. v. Brooks*, 258 A.3d 266 (Md. 2021) (failure to maintain client records and ledgers as required by state rule); *In re Krause*, 737 A.2d 874 (R.I. 1999) (failure to effectuate timely service of process demonstrated incompetence); *In re Schnee*, 854 S.E.2d 840 (S.C. 2021) (failure to file brief, resulting in dismissal of appeal); *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (failing to serve defendant within thirty days of filing lawsuit, thereby risking dismissal of case); *Bd. of Prof'l Responsibility v. Prewitt*, 647 S.W.3d 357 (Tenn. 2022) (failing to provide expert disclosures in compliance with rules of civil procedure). *But see Ky. Bar Ass'n v. Fernandez*, 397 S.W.3d 383 (Ky. 2013) (experienced lawyer's numerous ethics and court rule violations did not show lack of knowledge or competence so as to violate Rule 1.1).

• ***Technology***

Rule 1.1 requires a lawyer to have a basic understanding of the benefits and risks associated with relevant technology. Cmt. [8]; ABA Formal Ethics Op. 477R (2017). *See, e.g.,* ABA Formal Ethics Op. 498 (2021) (technological competence required when practicing virtually); ABA Formal Ethics Op. 483 (2018) (duty to monitor for and respond to data breach); ABA Formal Ethics Op. 11-459 (2011) (protecting confidentiality of client's electronic communications); Ala. Ethics Op. 2010-02 (n.d.) (cloud computing); Alaska Ethics Op. 2014-3 (2014) (cloud computing); Ariz. Ethics Op. 20-0008 (n.d.) (handling metadata); Cal. Ethics Op. 2020-203 (n.d.) (data security); San Diego Cnty. Ethics Op. 2018-3 (2018) (technology-assisted discovery); Colo. Ethics Op. 141 (2020) (data security); D.C. Ethics Op. 371 (2016) (social media); Fla. Ethics Op. 21-2 (2021) (accepting mobile or internet-based payments); Ill. Ethics Op. 16-06 (2016) (cloud computing); Ind. Ethics Op. 1-20 (2020) (social media); Ky. Ethics Op. 446 (2018) (cybersecurity); Mich. Informal Ethics Op. RI-381 (2020) (ensuring lawyer's procedures keep pace with technology risks); Miss. Ethics Op. 263 (2020) (cloud computing); Mo. Informal Ethics Op. 2021-12 (2021) (virtual law office); N.H. Ethics Op. 2019-20/3 (2020) (social media research on jurors); N.H. Ethics Op. 2018-19/1 (2019) (lawyer traveling with electronic devices should understand information storage and take reasonable steps to preserve confidentiality); N.Y. State Ethics Op. 842 (2010) (keeping up with advances in technology used in law practice); N.Y. Cnty. Ethics Op. 749 (2017) (electronically stored information [ESI] and e-discovery); N.Y. City Ethics Op. 2022-3 (2022) (copying client on email to opposing counsel); N.Y. City Ethics Op. 2015-3 (2015) (recognizing common e-mail trust account scams); N.C. Ethics Op. 2020-5 (2021) (avoiding wire fraud in real estate transactions); Ohio Bd. of Prof. Conduct Ethics Op. 2022-07 (2022) (handling cryptocurrency); Ohio Bd. of Prof. Conduct Ethics Op. 2017-5 (2017) (virtual law office); Pa. Formal Ethics Op. 2020-300 (2020) (protecting client information while working remotely); Tenn. Ethics Op. 2015-F-159 (2015) (cloud computing); Texas Ethics Op. 680 (2018) (cloud computing); Va. Ethics Op. 1898 (2022) (handling fee paid in cryptocurrency); W. Va. Ethics Op. 2015-02 (2015) (social media).

See generally Jan L. Jacobowitz & John G. Browning, *Legal Ethics and Social Media: A Practitioner's Handbook* (2d ed. 2022); John G. Browning, *The New Duty of Digital Competence: Being Ethical and Competent in the Age of Facebook and Twitter*, 44 U. Dayton L. Rev. 179 (2019); Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179 (2011); Katy (Yin Yee) Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 Geo. J. Legal Ethics 853 (Fall 2017); Renee Knake Jefferson, *Lawyer Ethics for Innovation*, 35 Notre Dame J.L. Ethics &

Pub. Pol'y 1 (2021); Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, 10 Case W. Reserve J.L. Tech. & Internet 1 (2019); Monica McCarroll, *Discovery and the Duty of Competence*, 26 Regent U. L. Rev. 81 (2013-2014); Amanda Moghaddam, "EZ ESI: Hands-on Advice for Handling and Using ESI in a Legal Malpractice Claim," *ABA/BNA Lawyers' Manual on Professional Conduct*, 33 Law. Man. Prof. Conduct 561 (Current Reports, Oct. 4, 2017); Ellen Platt, *Zooming into A Malpractice Suit: Updating the Model Rules of Professional Conduct in Response to Socially Distanced Lawyering*, 53 Tex. Tech L. Rev. 809 (2021); Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 Cornell L. Rev. 879 (2018); Lisa Z. Rosenof, *The Fate of Comment 8: Analyzing A Lawyer's Ethical Obligation of Technological Competence*, 90 U. Cin. L. Rev. 1321 (2022); Nicole Yamane, *Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands*, 33 Geo. J. Legal Ethics 877(2020).

SKILL

• *Drafting*

The skills required of a lawyer include the ability to draft pleadings and documents. *See, e.g., Philbrick v. Univ. of Conn.*, 51 F. Supp. 2d 164 (D. Conn. 1999) (admonishing lawyer for sloppy pleading that omitted crucial arguments); *In re Willis*, 505 A.2d 50 (D.C. 1985) (pleadings were sloppy, incoherent, incomplete, and misleading); *In re Hogan*, 490 N.E.2d 1280 (Ill. 1986) (nineteen pleadings or briefs contained incomprehensible arguments and writing); *In re Stern*, 11 N.E.3d 917 (Ind. 2014) (lawyer's pleadings were incomplete, difficult to understand, replete with spelling and grammatical errors, and included frivolous affirmative defenses); *Ky. Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000) (pleading was "little more than fifteen unclear and ungrammatical sentences slapped together as two pages of unedited text with an unintelligible message"); *Att'y Grievance Comm'n v. Costanzo*, 68 A.3d 808 (Md. 2013) (failure to do anything after retention but draft complaint having nothing to do with representation); *In re Hawkins*, 502 N.W.2d 770 (Minn. 1993) (repeated disregard of local bankruptcy rules coupled with incomprehensible written work containing numerous spelling, grammar, and typing errors); *In re Sheridan*, 813 A.2d 449 (N.H. 2002) (repeated failure to draft acceptable articles of incorporation); *In re Wallace*, 518 A.2d 740 (N.J. 1986) ("seriously deficient" drafting of promissory note); *In re Addison*, 611 S.E.2d 914 (S.C. 2005) (drafting conveyance documents with incorrect descriptions of realty); *In re Kagele*, 72 P.3d 1067 (Wash. 2003) (filing quiet title complaint with incorrect legal description of realty and failing to invoke prescriptive easement).

• *Legal Analysis*

Competence includes the ability to analyze relevant rules and principles and apply them to clients' circumstances. *See, e.g., People v. Woodford*, 97 P.3d 968 (Colo. O.P.D.J. 2004) (incorrectly advising that federal tax liens were dischargeable in bankruptcy); *In re Katz*, 981 A.2d 1133 (Del. 2009) (failing to realize or inform borrower clients that mortgage notes tendered by lender violated federal lending law and that lender failed to give three-day rescission rights); *Office of Disciplinary Counsel v. Au*, 113 P.3d 203 (Haw. 2005) (misrepresenting holding of published opinion); *In re Black*, 941 P.2d 1380 (Kan. 1997) ("failure to properly learn, observe and apply the rules for calculating child support demonstrates a lack of competency"); *Att'y Grievance Comm'n of Md. v. Portillo*, 251 A.3d 1131 (Md. 2021) (advising immigration clients not to appear for hearings, eliminating any chance for success); *Lieber v. Hartford Ins. Ctr. Inc.*, 15 P.3d 1030 (Utah 2000) (brief relied on overruled case and misrepresented distinguishable caselaw as general rule; lawyer also maintained that case has no value as precedent if not recently cited); *Lawyer Disciplinary Bd. v. Turgeon*, 557 S.E.2d 235 (W. Va. 2000) (failure to understand how federal sentencing guidelines applied to client's case); *cf. Att'y Grievance Comm'n v. Dyer*, 162 A.3d 970 (Md. 2017) ("motion or pleading that ultimately proves to be unsuccessful or even lack merit is not per se a violation" of Rule 1.1).

THOROUGHNESS AND PREPA RATION

• *Investigation and Research*

The interrelated obligations of thoroughness and preparation require a lawyer to investigate all relevant facts and research applicable law. *See, e.g., In re Deighan L. LLC*, 637 B.R. 888 (Bankr. M.D. Ala. 2022) (filing document with electronic "/s/" signature without verifying that client reviewed, executed or signed it violates duty of thoroughness); *People v. Boyle*, 942 P.2d 1199 (Colo. 1997) (failing to prepare adequately for hearing or to discover readily available evidence supporting

asylum petition); *People v. Felker*, 770 P.2d 402 (Colo. 1989) (preparing for divorce hearing only on way to courthouse, then failing to consult client about agreement to limit child support or to seek maintenance or support arrearages, equitable property division, attorneys' fees, or expenses); *In re Guy*, 756 A.2d 875 (Del. 2000) (failing to contact any of four potential criminal defense witnesses named by client); *Iowa Supreme Court Att'y Disciplinary Bd. v. Wright*, 840 N.W.2d 295 (Iowa 2013) (failure to conduct even cursory internet search or otherwise competently investigate and analyze Nigerian internet scam); *In re Murphy*, 473 P.3d 886 (Kan. 2020) (failure to give competent advice on sale of business listed as asset in bankruptcy); *Att'y Grievance Comm'n v. Sanderson*, 213 A.3d 122 (Md. 2019) (failing to attach necessary affidavits and identifying incorrect standard for proceeding); *In re Rios*, 965 N.Y.S.2d 418 (App. Div. 2013) (failing to ask client about exact location of accident in nonsuggestive manner); *In re Kovitz*, 504 N.Y.S.2d 400 (App. Div. 1986) (failing to investigate personal injury case for fourteen years, claiming it was trial tactic to outwait witnesses); *In re Summers*, 842 N.W.2d 842 (N.D. 2014) (failure to prepare for trial); *Toledo Bar Ass'n v. Wroblewski*, 512 N.E.2d 978 (Ohio 1987) (estate lawyer did not properly complete inventory and made no attempt to determine if any next of kin survived); *In re Greene*, 557 P.2d 644 (Or. 1976) (lawyer who was personal representative of estate failed to discover large savings account or ascertain true value of realty); *Disciplinary Counsel v. Baldwin*, 225 A.3d 817 (Pa. 2020) (failure to conduct proper investigation before representing multiple individuals before grand jury) (discussed in Douglas R. Richmond, *Sad Lawyering in Happy Valley*, 51 Stetson L. Rev. 29 (2021)); *Beard v. Bd. of Prof'l Responsibility*, 288 S.W.3d 838 (Tenn. 2009) (recommending client settle matter by paying $10,000 even though court order, which lawyer neglected to read, found client was owed $6,700); *In re Winkel*, 577 N.W.2d 9 (Wis. 1998) (failing to obtain information about trust funds held by clients' business, including amounts of deposits and disbursements made and claims of contractors on funds, before clients surrendered assets to bank); *In re Fischer*, 499 N.W.2d 677 (Wis. 1993) (signing, as attorney of record, complex pleadings forwarded by "American Constitutional Coalition Foundation," which processed complaints from inmates challenging their incarceration, without meeting with inmates or otherwise attempting to ascertain basis for claims); *see also* Fla. Ethics Op. 00-4 (2000) (lawyer providing legal services over internet must inform client when matter's complexity requires meeting in person and, if client refuses, must decline representation or withdraw).

• Application to Client Matters

After learning the relevant law and facts, a lawyer must then apply them to the clients' matters. *See Erpenbeck v. Ky. Bar Ass'n*, 295 S.W.3d 435 (Ky. 2009) (learning, but failing to inform lender client, of existing mortgages on two properties); *Att'y Grievance Comm'n of Md. v. Karambelas*, 248 A.3d 1019 (Md. 2021) (estate lawyer failed to share knowledge that will existed and failed to ensure estate met its tax obligations); *Att'y Grievance Comm'n v. Framm*, 144 A.3d 827 (Md. 2016) (lawyer hired to explain marital settlement agreement by client with diminished capacity abused discovery, failed to recognize inherent conflict of interest or conduct adequate research on guardianship petitions, and failed to explain to client that cost of continuing litigation might negate any possible benefit); *In re Fett*, 790 N.W.2d 840 (Minn. 2010) (advising client agent under power of attorney to transfer principal's assets to himself without explaining possible consequences); *State ex rel. Okla. Bar Ass'n v. Silvernail*, 522 P.3d 464 (Okla. 2022) (lawyer who anticipated own incarceration should have foreseen inability to provide prompt, competent representation and closed practice); *In re Fayssoux*, 675 S.E.2d 428 (S.C. 2009) (failing to heed "red flags" of fraud and proceeding with twenty-eight fraudulent real estate closings); *In re Welcome*, 58 V.I. 236 (V.I. 2013) (failing to respond to dispositive motion); ABA Formal Ethics Op. 500 (2021) (when lawyer and client do not speak common language or client has hearing, speech or vision disability, duty of competence requires steps to establish reasonably effective mode of communication); D.C. Ethics Op. 373 (2017) (criminal defense lawyer appointed in domestic violence case to represent defendant with parallel civil protection order matter should consider advising client on reciprocal effects of developments in each case on the other); Wash. Ethics Op. 201501 (2015) (lawyer advising client with marijuana-related business permitted under state law must also advise on risks under federal law).

MENTAL HEALTH AND WELLNESS

Recent years have seen proposals to treat lawyer well-being as an element of competence. *See The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (National Task Force on Lawyer Well-Being, 2017) at 20.2, *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lawyer_well_being_report_final.pdf (rule or comments should be revised "to more clearly include lawyers' well-being in the definition of 'competence."D'). Some jurisdictions have added wellness provisions to Rule 1.1 or its comments. *See, e.g.,*

Cal. Rule 1.1(b)("'competence' in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service"); Vt. Rule 1.1, Cmt. [9] ("[a] lawyer's mental, emotional, and physical well-being may impact the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical well-being necessary for the representation of a client is an important aspect of maintaining competence to practice law"); Va. Rule 1.1, Cmt [7] ("[a] lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law"); *see also* D.C. Ethics Op. 377 (2019) (law firm's duties with respect to mentally impaired lawyer); Md. Ethics Op. 2021-04 (2021) (lawyer may use cannabis in compliance with Medical Cannabis Statute if no adverse effect on lawyer's compliance with Rules); Pa. Ethics Op. 2021-200 (2021) (lawyer using medical marijuana must withdraw if underlying medical condition or treatment impairs ability to represent client competently and diligently; if treatment may result in temporary impairment, lawyer must refrain from acting for client until effects have subsided). *See generally* Nicholas D. Lawson, *"%7FTo Be a Good Lawyer, One Has to Be a Healthy Lawyer": Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 Geo. J. Legal Ethics 65 (2021).

FAILURE TO COMPLY WITH ETHICS RULES

A lawyer's failure to comply with a duty imposed by another ethics rule may also constitute lack of competence under Rule 1.1. *See, e.g., In re Muhammad*, 3 So. 3d 458 (La. 2009) (accepting criminal defense matter though lawyer was related to both victim and defendant violated Rules 1.1 and 1.71.7); *Att'y Grievance Comm'n v. Zuckerman*, 944 A.2d 525 (Md. 2008) (failing to ensure settlement and judgment monies were promptly accounted for and disbursed facilitated office manager's embezzlement and so violated Rules 1.1 and 1.151.15); *Cincinnati Bar Ass'n v. Lawson*, 891 N.E.2d 749 (Ohio 2008) (failing to arrange service on defendant for several months even after being ordered to do so by presiding judge violated Rules 1.1 and 1.3); *State ex rel. Okla. Bar Ass'n v. Clausing*, 224 P.3d 1268 (Okla. 2009) (taking loan from trust he created for settlor and for which lawyer was trustee violated Rules 1.1, 1.71.7, and 1.81.8); *In re Sturkey*, 657 S.E.2d 465 (S.C. 2008) (conversing with criminal defendant client within earshot of police officers violated Rules 1.1 and 1.6); *cf.* Rule 1.6, cmt. [18] (lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure"). *But see In re Ward*, 881 N.W.2d 206 (N.D. 2016) (failure to respond to communications or otherwise maintain "cooperative relationship" with bankruptcy trustee violated Rule 1.3 but not Rule 1.1; court noted policy of discouraging "'stacking' or "piling on"D' charges of rule violations for same conduct).

DELEGATION AND SUPERVISION

Because a lawyer is required to supervise subordinate lawyers and nonlawyer staff, the ethical obligation of competence cannot be avoided by referring a matter to another. *E.g., In re Herbst*, 931 A.2d 1016 (D.C. 2007) (allowing nonlawyer staff member to negotiate settlement of client's case); *Att'y Grievance Comm'n v. Moawad*, 257 A.3d 611 (Md. 2021)(failure to provide oversight to non-attorney staff resulted in lack of competent representation); *In re Saab*, 547 N.E.2d 919 (Mass. 1989) (lawyer who had never handled domestic relations appeal turned it over to inexperienced junior associate whom he then failed to supervise); *In re Martin*, 699 S.E.2d 695 (S.C. 2010) (failure to timely file documents warranted discipline notwithstanding lawyer's assertions that he delegated tasks to nonlawyer staff); ABA Formal Ethics Op. 08-451 (2008) ("lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1"); *accord* San Diego Cnty. Ethics Op. 2007-1 (2007); Colo. Ethics Op. 121 (2009); N.C. Ethics Op. 2007-12 (2008). *See also* Cal. Ethics Op. 2021-206 (n.d.) (competence includes mental and emotional ability to perform legal services; impaired lawyer's conduct can trigger obligations for subordinates and supervisors). *But see In re Wilkinson*, 805 So. 2d 142 (La. 2002) (failure to supervise work of law clerk warranted discipline under Rule 5.1Rule 5.1 but not Rule 1.1). *See generally* Rule 5.1Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers); Rule 5.3Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance).

INEXPERIENCE

- ***New Lawyers***

Lack of competence may be a particular problem for the new or inexperienced lawyer. *E.g.*, *Wise v. Washington Cnty.*, No. 10-1677, 2015 WL 1757730, 2015 BL 110240 (W.D. Pa. Apr. 17, 2015) (failure to adequately investigate or properly counsel client on risks and other substandard practice in civil rights case); *In re Landrith*, 124 P.3d 467 (Kan. 2005) (lawyer practicing for only four months engaged in egregious and protracted misbehavior); *In re Martin*, 982 So. 2d 765 (La. 2008) (lawyer mishandled first federal criminal defense case; inexperience cited as mitigating factor); *In re Yacavino*, 494 A.2d 801 (N.J. 1985) (new lawyer left alone and unsupervised in firm's outlying office failed to complete adoption; court condemned firm's attitude of leaving new lawyers to "sink or swim"); *Columbus Bar Ass'n v. Kizer*, 915 N.E.2d 314 (Ohio 2009) (lawyer neglected four separate matters within first four years of beginning practice); *see also* Rule 5.1Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers). *See generally* Christopher Sabis & Daniel Webert, *Understanding the ""Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 Geo. J. Legal Ethics 915 (Summer 2002).

• Unfamiliarity with Areas of Law

Competence includes the ability to discern when an undertaking requires specialized knowledge or experience that a lawyer does not have and requires that the lawyer either acquire the expertise, associate with a specialist, or decline the undertaking and refer it to a competent specialist. *See United States v. Munoz*, No. 1:20-MJ-00090-SAB-1, 2022 WL 1430300 (E.D. Cal. May 5, 2022) (inexperience in federal criminal court system no excuse; lawyer failing to rise to responsibility of informing self of rules should not represent federal criminal defendants); *In re Fisher*, 202 P.3d 1186 (Colo. 2009) (lawyer who had never handled case involving federal pension failed to investigate requirements for securing divorce client's rights to ex-husband's federal pension); *In re Blickman*, 164 N.E.3d 708 (Ind. 2021) (no violation by lawyer who did timely research before advising client; rule "does not demand perfection or even specialized expertise" but instead "demands competency and explicitly anticipates, both in the text of the rule and its commentary, that preparation and research frequently will be necessary"); *In re Terry*, 265 P.3d 537 (Kan. 2011) (lawyer with no experience in employment discrimination ""failed to represent [plaintiff] with the legal knowledge, skill, thoroughness, and preparation reasonably necessary"); *Att'y Grievance Comm'n of Md. v. Yi*, 235 A.3d 963 (Md. 2020) (rejecting inexperience as excuse: "[a] competent attorney recognizes the limits of his or her expertise and does not put the client at risk in venturing beyond it"); *In re Kaszynski*, 620 N.W.2d 708 (Minn. 2001) (ignorance of immigration law and procedures and failure to supply documentation required to support clients' claims for relief put clients in danger of deportation); *Miss. Bar v. Pegram*, 167 So. 3d 230 (Miss. 2014) (lawyer acknowledging lack of competence to handle criminal trial should not have agreed to act as sole counsel and should have limited role to negotiating pretrial diversion); *State ex rel. Counsel for Discipline v. Orr*, 759 N.W.2d 702 (Neb. 2009) (lawyer should have recognized specialized nature of franchising law and performed research necessary to become competent); *Richmond's Case*, 872 A.2d 1023 (N.H. 2005) ("Rule 1.1 mandates that a general practitioner must identify areas in which the lawyer is not competent"); *In re Yetman*, 552 A.2d 121 (N.J. 1989) (failure to refer complex matter beyond lawyer's competence is itself violation of duty of competence); *State ex rel. Okla. Bar Ass'n v. Burton*, 482 P.3d 739 (Okla. 2021) (no violation by lawyer who did little to further estate and was unaware of rules for payment in probate cases but remained on case only three months before involving more experienced counsel);

Disciplinary Counsel v. Baldwin, 225 A.3d 817 (Pa. 2020) (lawyer lacked criminal law experience, had never represented a client before a grand jury and failed to consult with experienced counsel); *In re Peper*, 763 S.E.2d 205 (S.C. 2015) (lawyer recognized his lack of competence but failed to limit scope of representation and missed statute of limitations); *In re Dumke*, 635 N.W.2d 594 (Wis. 2001) (lawyer unfamiliar with sexual predator proceedings failed to hire or seek appointment of expert to evaluate testing methods and risk analysis upon which state based its opinion that client was sexually violent person); *see also* ABA Formal Ethics Op. 465 (2013) (must limit Groupon or deal-of-the-day offer to services and areas in which lawyer is competent); Cal. Ethics Op. 2020-202 (n.d.) (if lawyer representing cannabis business cannot acquire full range of specialized knowledge through study or consulting with other counsel, lawyer should limit scope of representation to issues within lawyer's competence and ask client to obtain other counsel for remaining issues); *cf.* N.C. Ethics Op. 2010-6 (2011) (advertising for matters in legal areas in which lawyer is inexperienced is permissible only if advertisement includes statement that lawyer will associate with experienced lawyer). *See generally* Christine M. Macey, *Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 Geo. J. Legal Ethics 979 (Summer 2009) ("if the first-time advocate is willing to prepare adequately and the well-informed client wants her to remain on the case, the lawyer has no ethical obligation to refer the case to a specialist"); Brad S. McLelland, *Attorney Competence or Lack Thereof--Under What Circumstances May an Attorney Ethically Handle a Matter in Which the Attorney Is Not Competent? Is an Ethical Rule Necessary to Restrain Such an Attorney?*, 22 J. Legal Prof. 297 (Spring 1998) (comparing provisions of Model Code and Rules permitting lawyer to provide services on emergency basis in legal field in which lawyer is unfamiliar).

Self-Education in Unfamiliar Area

Although, as Comment [2] notes, it is possible for a lawyer to provide competent representation in a wholly novel field through "necessary study," the lawyer should not expect the client to pay for excessive amounts of time preparing for tasks that with experience become routine, *In re Estate of Larson*, 694 P.2d 1051 (Wash. 1985), or for "every minute of the lawyer's preparation." *Robert L. Wheeler, Inc. v. Scott*, 777 P.2d 394 (Okla. 1989) (fee award reduced when first-year associate assigned to case). *See generally* Rule 1.5Rule 1.5 (Fees).

SIXTH AMENDMENT CONSIDERATIONS

Incompetent representation by criminal defense counsel can violate the Sixth Amendment right to effective assistance of counsel. *See* *Strickland v. Washington*, 466 U.S. 668 (1984). However, the evaluation of competence for Sixth Amendment purposes may differ from the evaluation of competence for Rule 1.1 purposes. *See, e.g., In re Wolfram*, 847 P.2d 94 (Ariz. 1993) (ineffective assistance may serve as predicate for disciplinary action, but post-conviction relief does not necessarily equate to violation of ethics rules); *Fla. Bar v. Sandstrom*, 609 So. 2d 583 (Fla. 1992) (representation of murder defendant whose conviction was vacated on ground of ineffective assistance included "such a flagrant lack of preparation and such deficient performance" as to warrant suspension); *Att'y Grievance Comm'n v. Middleton*, 756 A.2d 565 (Md. 2000) (failure to move to suppress evidence, present favorable evidence, or prepare for cross-examination of prosecution witnesses resulted in post-conviction relief for defendant and discipline for lawyer); *In re Agrillo*, 604 N.Y.S.2d 171 (App. Div. 1993) (although reversal of client's conviction on ground of ineffective assistance will not always result in determination of professional misconduct, respondent's specific admissions-- that he went to trial unprepared, failed to place his level of unpreparedness on record, and made no record of his alleged inability to hear trial testimony--clearly established ethics violations); *In re Longacre*, 122 P.3d 710 (Wash. 2005) (that lawyer's representation was previously held ineffective was not dispositive of later Rule 1.1 inquiry).

PUBLIC DEFENDERS AND APP OINTED COUNSEL

The obligation to be adequately prepared may justify a refusal to proceed with the defense of a criminal case if a court-appointed lawyer or public defender has not had an adequate opportunity to prepare. *See* *In re Sherlock*, 525 N.E.2d 512 (Ohio Ct. App. 1987) (public defender's contempt vacated when order to proceed with trial required her to violate her professional responsibility under DR 6-101(A)(2), requiring adequate preparation); *see also* *Easley v. State*, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976) (lawyer who usually handled civil cases but was appointed to represent criminal defendant properly advised client he felt incompetent to handle case; finding of criminal contempt for securing client's affidavit in support of motion to reconsider after denial of motion to withdraw as counsel reversed). *But see* *In re Roose*, 69 P.3d 43 (Colo. 2003) (affirming discipline of appointed lawyer who walked out of jury trial after being ordered to proceed despite her inexperience). The potential violation of Rule 1.1 may also be ""good cause" for a lawyer to seek to avoid appointment by a court. *See* annotation to Rule 6.2Rule 6.2.

HEAVY CASELOADS

The duty to provide competent representation requires a lawyer to keep her caseload manageable to allow adequate time and effort for each client matter. *See* *Davis v. Ala. State Bar*, 676 So. 2d 306 (Ala. 1996) (disciplining lawyers who, "in an effort to turn over a huge volume of cases, neglected their clients and . . . prevented [associates] from providing quality and competent legal services"); *Att'y Grievance Comm'n v. Ficker*, 924 A.2d 1105 (Md. 2007) (running "high-volume operation" of criminal defense cases resulted in neglect of several clients' matters).

Excessive caseloads can be a significant problem for public defenders, prosecutors, other government lawyers, and lawyers appointed to represent indigent defendants. When heavy caseloads due to circumstances beyond such lawyers' control jeopardize their ability to render competent representation, the lawyers may be obligated to seek to withdraw. Rule 1.16(a)(1) (requiring withdrawal if continued representation would violate an ethics rule or other law); ABA Formal Ethics Op. 06-441 (2006) (public defender or lawyer appointed to defend indigent defendant "must move to withdraw from representation if she

cannot provide competent and diligent representation"); *accord* Mich. Informal Ethics Op. RI-252 (1996); N.Y. State Ethics Op. 751 (2002); Or. Ethics Op. 2007-178 (2007); Utah Ethics Op. 96-07 (1996); *see also* American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (Summer 2003) (see Guidelines 6.1 (Workload) and 10.3 (Obligations of Appointed Counsel Respecting Workload)); *cf.* *In re Edward S.*, 92 Cal. Rptr. 3d 725 (Ct. App. 2009) (public defender's heavy caseload and inadequate resources rendered competent representation impossible, warranting new trial); *Pub. Defender v. State*, 115 So. 3d 261 (Fla. 2013) (aggregate motion to withdraw granted when public defender's office had grossly excessive caseload precluding systemic competent representation); *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012) (trial court erred in appointing public defender's office to represent defendant given office's certification of limited availability due to excessive caseload); *State ex rel. Okla. Bar Ass'n v. Ward*, 353 P.3d 509 (Okla. 2015) (declining to find prosecutor's inadequate trial preparation due to heavy caseload violated duty of competence); American Bar Association, *Eight Guidelines of Public Defense Related to Excessive Workloads* (Aug. 2009), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf (see comment to Guideline 1: "if workloads are excessive, neither competent nor quality representation is possible"). *See generally* Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 Wash. U. J.L. & Pol'y 205 (2011).

If withdrawal is not permitted, a lawyer must continue the representation to the best of their ability. Rule 1.16(c); S.C. Ethics Op. 04-12 (2004) (if court "denies the motion to withdraw, the attorney must continue the representation even if the attorney believes that the attorney's caseload prevents the attorney from providing competent representation").

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