NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 1092

New York State Bar Association
Committee on Professional Ethics

Opinion 1092 (5/11/2016)

Topic: Duty to Disclose Malpractice of Co-Counsel

Digest: A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim.

Rules: 1.4(a) & (b), 1.7(a), 1.16(b), 8.4(c)

FACTS

1. The inquirer was engaged to represent a client on the eve of trial. The client's prior counsel is serving as co-counsel. In preparing the case, the inquirer has learned that co-counsel conducted virtually no discovery and made no document requests, although the inquirer believes correspondence and emails between the parties could be critical to the case. The inquirer believes this was a significant error or omission that may give rise to a malpractice claim against co-counsel. The outcome of the case, however, has yet to be decided. The inquirer is concerned about disclosing this situation to the client because it would undermine inquirer's relationship with co-counsel, but the inquirer also believes it is in the client's best interests to disclose the facts as soon as possible.

QUESTION

2. Is a lawyer ethically obligated to disclose to a current client the lawyer's belief that a current co-counsel to the client has engaged in a significant error or omission in representing the client?

OPINION

3. Our opinions have consistently held that a lawyer must report to a client a significant error or omission by the lawyer in his or her rendition of legal services. See N.Y. State 734 (2000), N.Y. State 295 (1973), N.Y. State 275 (1972). See also ABA Informal Op. 1010 (1967).

4. Most of these opinions are based on two principles in the former Code of Professional Responsibility – the lawyer's obligation to keep the client fully informed, and the lawyer's obligation to withdraw from representation where the lawyer has a personal conflict of interest. Those two principles are now embodied in Rule 1.4 and Rule 1.7. [1]

5. Rule 1.4 governs the ethical obligations of a lawyer regarding communication with the client:

> (a) A lawyer shall (1) promptly inform the client of... (iii) any material developments in the matter...; (3) keep the client reasonably informed about the status of the matter; and
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Emphasis added.]

6. Comment [1] to Rule 1.4 reveals the touchstone for the lawyer's obligation: client autonomy in decision-making. Comment [1] says: "Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation." See also Comment [3] ("paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation").

7. The second principle reflected in our opinions on the lawyer's own malpractice is whether the significant error or omission results in an inherent conflict between the interest of the client and the lawyer's own interest. In that case, Rule 1.16(b) may require the lawyer to withdraw. Rule 1.7(a)(2) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.[2]

8. Although the personal conflict of interest may be more obvious in the case of a lawyer dealing with his or her own malpractice, here there may be a personal conflict concern because the inquirer notes that "exposing counsel's malpractice would undermine our relationship with co-counsel." The inquirer does not state whether the inquirer was brought into the case by the client or by co-counsel, or whether co-counsel has referred matters to the inquirer in the past, or the inquirer expects co-counsel to be a potential source of referrals in the future. The desire to maintain a good relationship with co-counsel would only implicate a personal conflict of interest under Rule 1.7(a) if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected" by the lawyer's financial or personal interests. For example, if the desire for harmony with co-counsel is

motivated by the goal of avoiding harm to this client's case, such desire would clearly not be a "personal interest" within the meaning of Rule 1.7(a)(2). That is an issue that the inquirer must determine in the first instance.

9. In N.Y. State 734 (2000), this Committee opined that a lawyer "must report to the client a significant error or omission by the lawyer that may give rise to a possible malpractice claim...." We cited N.Y. State 275 (1972), which said that a lawyer who failed to file a claim within the statute of limitations period "had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages." Opinion 734 also pointed out, however, that not every possible error creates a possible claim for malpractice:

> Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

10. Several bar association ethics opinions have opined that lawyers have an ethical obligation to disclose their own malpractice.[3] Numerous court cases and disciplinary opinions concur.[4] Legal writers have also discussed the obligation.[5] Finally, a lawyer's duty to inform the client of his or her own malpractice is also supported by the Restatement (Third) of The Law Governing Lawyers § 20 cmt. c (2000) (Am. Law Inst. 1998) ("If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client," citing In re Tallon, 447 N.Y.S.2d 50 (App. Div. 1982)).

11. The lawyer's obligation to keep the client fully informed under Rule 1.4(a) applies equally to a significant error or omission by co-counsel that may give rise to a malpractice claim. See Estate of Spencer v. Gavin, 946 A.2d 1051 (N.J. Super. A.D. 2008). In Estate of Spencer the New Jersey court held that a lawyer who did not report co-counsel's theft of client funds could be liable for malpractice. The court in Estate of Spencer based its decision in part on New Jersey Rule 1.4(a).

12. As in the case of the lawyer's own malpractice, the inquirer has a duty to inform the client of co-counsel's malpractice if the inquirer concludes that co-counsel's error or omission was significant. It is not clear from the inquiry whether the inquirer has spoken to the co-counsel to determine his or her strategy for the matter (i.e., why co-counsel took "virtually no" discovery and made no document requests). Co-counsel's decision may have been negligent, but it may have been strategic. In any event, determining whether co-counsel's actions indicate a significant error or omission that may give rise to a malpractice claim involves questions of fact and law that are beyond the jurisdiction of this Committee.

13. If the inquirer determines that co-counsel has engaged in a significant error or omission that may give rise to a malpractice claim, then the lawyer must inform the client. This is particularly so because the client needs the information when the lawyer who has committed the significant error or omission is continuing to represent the client. As one writer has described it:

> Among the most critical decisions that the client has to make regarding the representation in that situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later, and (2) whether to continue the current representation.[6]

14. Here, if co-counsel has committed a significant error or omission that may give rise to a malpractice claim, the client may choose among many options, such as (i) continuing the attorney-client relationship with co-counsel and reserving any possible malpractice claim for later, (ii) terminating co-counsel while keeping the inquirer (or hiring a different lawyer), or (iii) bringing a malpractice action against co-counsel now. The client may want to seek independent advice regarding these options. Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." However, the client can only make an informed choice among those options if the lawyer gives the client the relevant information about co-counsel's past conduct. Accordingly, Rule 1.4(b) requires that the lawyer disclose to the client the facts that the lawyer has learned about co-counsel.

15. The Bar has traditionally been leery of situations where the client seeks to replace one lawyer with another (sometimes referred to as "encroaching on professional employment of other lawyers"). See N.Y. State 305 (1973) ("A prospective substitute lawyer should . . . take special care to avoid suspicion that he may be using improper means to have himself substituted for the previously retained attorney. Thus he must not wrongfully or improperly disparage the other lawyer in an endeavor to supplant him ...."); N.Y. State 310 (1973) (lawyer retained to review work of another lawyer must have sufficient information respecting the work being evaluated to give a good faith opinion which will be completely fair to the other lawyer"). The source of this reticence may have been a concern over "solicitation" of employment, which does not apply with the same force to co-counsel whom the client has already employed. Nevertheless, the overriding concern of these opinions is fairness to other lawyers, including co-counsel, so Rule 1.4's concern with the best interests of the client indicates that the inquirer should not report misgivings about co-counsel to the client unless the inquirer reasonably believes co-counsel has committed a significant error or omission that may give rise to a malpractice claim. This standard is lower than the "knowledge" standard that triggers a lawyer's duty under Rule 8.3(a) to report another lawyer's disciplinary violation, but we do not think a lawyer should report co-counsel's shortcomings absent a well-grounded belief that the client needs the information to make informed decisions about the representation.

16. In N.Y. State 275 (1972), the error was not only significant, but irremediable, since the statute of limitations had passed. We do not believe the action of co-counsel must be irremediable before the inquirer should report it to the client.

CONCLUSION

17. A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, who is currently co-counsel to the client, has committed a significant error or omission that may give rise to a malpractice claim.

[1]In re Tallon, 447 N.Y.S.2d 50 (App. Div. 1982), a case often cited for the principle that a lawyer must disclose the lawyer's errors and omissions to the client, also cites the predecessor to Rule 8.4(c), which provided that "a lawyer must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." However, in Tallon, the lawyer had not only failed to disclose to the client the fact that he had let the statute of limitations run on her claim, but also obtained a general release from the client without advising the client of the claim against him. Other courts and ethics committees that have addressed the issue have also based their conclusions on the two principles cited here. See the authorities cited in notes accompanying ¶ 10 infra.

[2]For a discussion of personal conflicts of interest arising from a lawyer's possible malpractice, see Cooper, infra n. 6, at 182. See also Vincent R. Johnson, Absolute and Perfect Candor to Clients, 34 St. Mary's L.J. 737, 773 (2003). When a lawyer confronts the issue whether to disclose his or her own potential malpractice, it gives rise to personal conflict of interest issues under Rule 1.7. See Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 24:5 (ThomsonWest 2008); In re Hoffman, 700 N.E.2d 1138, 1139 (Ill. 1998); Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that the client might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests).

[3]See, e.g., New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 684, 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (March 9, 1998) ("Clearly RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); Colo. Bar Ass'n, Ethics Comm. Formal Op. 113 (2005) (concluding that Colorado Rule 1.4 requires a lawyer to tell the client if the lawyer makes an error).

[4]See, e.g., People v. Greene, 276 P.3d 94, 99 (Colo. 2011); Beal Bank v. Arter & Hadden, 167 P.3d 666, 672 (Cal. 2007) (stating in dicta that attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice); DeLuna v. Burciaga, 223 Ill.2d 49 (Ill., 2006) (lawyer improperly concealed facts resulting in the running of the statute of limitations on the client's malpractice claim against the lawyer, in violation of Illinois Rule 1.4); Attorney Grievance Comm'n of Maryland v. Pennington, 387 Md. 565, 876 A.2d 642, 650 (Md. 2005) (lawyer violated Rule 1.4 by failing to disclose a mistake and concealing it); Olds v. Donnelly, 150 N.J. 424 (N.J., 1997) (New Jersey Rules of Professional Conduct "require an attorney to notify the client that he or she may have a legal-malpractice claim even if notification is against the attorney's own interest"); Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney.

[5]For additional discussion of a lawyer's duty to disclose malpractice, see 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 15:22 (2008 ed.); Dolores Dorsainvil, et al., My Bad: Creating a Culture of Owning Up to Lawyer Missteps and Resisting the Temptation to Bury Professional Error, Report to Annual Conference of the Litigation Section of the American Bar Association, April 16, 2015, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/18_1_my_bad_creating_a_culture_of_owning_up_to_lawyer_missteps.authcheckdam.pdf; Thomas P. McGarry and Thomas P. Sukowicz, Ethics: Disclosing Malpractice to Clients, CHICAGO LAWYER, Dec. 2011, available at http://www.chicagolawyermagazine.com/Archives/2011/12/McGarry-Sukowicz-

Ethics.aspx; David D. Dodge, Front Eye On Ethics, Owning Up To Your Own Mistakes, ARIZONA ATTORNEY, 46 Ariz. Att'y 10 (May 2010); Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, WISCONSIN LAWYER, 83-FEB Wis. Law. 6, 7-8 (February 2010); Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 20 (Winter 2008); Charles E. Lundberg, Self-Reporting Malpractice or Ethics Problems, 60 Bench & B. Minn. 24 (Sept. 2003); Lazar Emanuel, Duty to Disclose Error That May Constitute Malpractice, N.Y. Prof. Resp. Rep. (Feb 1, 2001).

[6]Benjamin Cooper, The Lawyer's Duty to Inform His Client of His Own Malpractice, 61 Baylor L. Rev. 174, 184 (2009), citing Frances Patricia Solari, Malpractice and Ethical Considerations, 19 N.C. Cent. L.J. 165, 175 (1991).

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McKinney's New York Rules of Court
State Rules of Court
Court of Appeals
Part 500. Rules of Practice
General Matters

N.Y.Ct.Rules, § 500.4

§ 500.4. Pro Hac Vice Admission.

Currentness

An attorney or the equivalent who is a member of the bar of another state, territory, district or foreign country may apply to appear pro hac vice with respect to a particular matter pending in this Court (see 22 NYCRR 520.11[a] [Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law--Admission Pro Hac Vice]). The application shall consist of a letter request to the Clerk of the Court, with proof of service on each other party, and shall include current certificates of good standing from each jurisdiction in which the applicant is admitted and any orders of the courts below granting such relief in the matter for which pro hac vice status is sought.

N. Y. Ct. Rules, § 500.4, NY R A CT § 500.4
Current with amendments received through April 15, 2019.

End of Document

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle B. Courts.
Chapter I. Court of Appeals
Subchapter C. Rules for Admission of Attorneys and Counselors-at-Law
Part 520. Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law (Refs & Annos)

22 NYCRR 520.11

Section 520.11. Admission pro hac vice

(a) *General.* An attorney and counselor-at-law or the equivalent who is a member in good standing of the bar of another state, territory, district or foreign country may be admitted *pro hac vice:*

(1) in the discretion of any court of record, to participate in any matter in which the attorney is employed; or

(2) in the discretion of the Appellate Division, provided applicant is a graduate of an approved law school, to advise and represent clients and participate in any matter during the continuance of applicant's employment or association with an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, Corporation Counsel or the Attorney General, but in no event for longer than 18 months.

(b) *New York Law students.* A graduate student or graduate assistant at an approved law school in New York State may be admitted *pro hac vice* in the discretion of the Appellate Division, to advise and represent clients or participate in any matter during the continuance of applicant's enrollment in an approved law school in New York State as a graduate student or graduate assistant, or during applicant's employment as a law school teacher in an approved law school in New York State, if applicant is in good standing as an attorney and counselor-at-law or the equivalent of the bar of another state, territory, district or foreign country and is engaged to advise or represent the client through participation in an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, corporation counsel or the Attorney General, but in no event for longer than 18 months.

(c) *Association of New York counsel.* No attorney may be admitted *pro hac vice* pursuant to paragraph (a)(1) of this section to participate in pre-trial or trial proceedings unless he or she is associated with an attorney who is a member in good standing of the New York bar, who shall be the attorney of record in the matter.

(d) *Provision of legal services following determination of major disaster.*

(1) Determination of existence of major disaster. Upon the declaration of a state of disaster or emergency by the Governor of New York or of another jurisdiction, for purposes of this subdivision, this court shall determine whether an emergency exists affecting the justice system.

(2) Temporary pro bono practice following the determination of a major disaster. Following a determination by this court that persons residing in New York are:

(i) affected by a state of disaster or emergency in the entirety or a part of New York; or

(ii) displaced by a declared state of disaster or emergency in another jurisdiction, and such persons are in need of pro bono services and the assistance of attorneys from outside of New York is required to help provide such services, an attorney authorized to practice law in another United States jurisdiction may provide legal services in New York on a temporary basis. Such legal services must be provided on a pro bono basis without compensation from the client, or expectation of compensation or other direct or indirect pecuniary gain to the attorney from the client. Such legal services shall be assigned and supervised through an established not-for-profit bar association in New York or an organization described in subdivision 7 of section 495 of the Judiciary Law.

(3) Other temporary practice following the determination of a major disaster. Following the determination of a major disaster in another United States jurisdiction - after such a declaration of a state of disaster or emergency and its geographical scope have been made by the Governor and a determination of the highest court of that jurisdiction that an emergency exists affecting the justice system - an attorney who has been authorized to practice law and is in good standing in that jurisdiction and who principally practices in that affected jurisdiction may provide legal services in New York on a temporary basis in association with an attorney admitted and in good standing in New York. The authority to engage in the temporary practice of law in New York pursuant to this paragraph shall extend only to attorneys who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services. Those legal services shall be limited to:

(i) representing clients with respect to matters that the attorney was handling prior to the disaster; and

(ii) new matters in the area affected by the disaster that the attorney could have handled but is unable to do so because:

(*a*) the attorney's ability to practice in the jurisdiction affected by the disaster has been limited by the disaster; and/or

(*b*) the client has temporarily relocated from the disaster area to another jurisdiction because of the disaster.

(4) Duration of authority for temporary practice. The authority to practice law in New York granted by paragraph (2) of this subdivision shall end when this court determines that the conditions caused by the major disaster in New York have ended except that an attorney then representing clients in New York pursuant to paragraph (2) of this subdivision is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the attorney shall not thereafter accept new clients. The authority to practice law in New York granted by paragraph (3) of this subdivision shall end 60 days after either the Governor or this court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(5) Court appearances. The authority granted by this subdivision does not include appearances in court except pursuant to subdivision (a) of this section.

(6) Admission and registration requirement. An attorney may be admitted pro hac vice in the discretion of the Appellate Division, provided the applicant is a graduate of an approved law school and is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, to provide legal services in New York pursuant to paragraph (2) or (3) of this subdivision. Such applicant must file a registration statement with the Office of Court Administration before the commencement of the provision of legal services. The application shall be in a form prescribed by the Appellate Division and the registration statement shall be in a form prescribed by the Office of Court Administration.

(7) Notification to clients. Attorneys authorized to practice law in another United States jurisdiction who provide legal services pursuant to this subdivision shall inform clients in New York of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and the limitations on their authorization to practice law in New York as permitted by this subdivision. They shall not state or imply to any person that they are otherwise authorized to practice law in New York.

(e) *Professional Responsibility Requirements.*

An attorney admitted pro hac vice pursuant to this section:

(1) shall be familiar with and shall comply with the standards of professional conduct imposed upon members of the New York bar, including the rules of court governing the conduct of attorneys and the Rules of Professional Conduct; and

(2) shall be subject to the jurisdiction of the courts of this State with respect to any acts occurring during the course of the attorney's participation in the matter.

Credits

Sec. added by renum. 520.9, filed Sept. 21, 1981; renum 520.12, new added by renum. and amd. 520.10, filed Oct. 21, 1984; renum. 520.12; new filed Jan. 18, 1995; amds. filed: May 7, 1998; March 30, 2000; Jan. 19, 2011 eff. Feb. 9, 2011. Relettered (d) to (e), added new (d).

Current with amendments included in the New York State Register, Volume XXLI, Issue 18 dated May 1, 2019. Court rules under Title 22 may be more current.

22 NYCRR 520.11, 22 NY ADC 520.11

End of Document

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Appendix
Rules of Professional Conduct [eff. April 1, 2009, As Amended to March 15, 2019.] (Refs & Annos)
Advocate

Rules of Prof. Con., Rule 3.3 McK.Consol.Laws, Book 29 App.

Rule 3.3. Conduct Before a Tribunal

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b) -- including the prohibitions against offering and using false evidence -- apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false

evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth finding process, which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's

disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Notes of Decisions (70)

Rules of Prof. Con., Rule 3.3 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 3.3
Current with amendments through March 15, 2019.

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McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Appendix
Rules of Professional Conduct [eff. April 1, 2009. As Amended to March 15, 2019.] (Refs & Annos)
Maintaining the Integrity of the Profession

Rules of Prof. Con., Rule 8.4 McK.Consol.Laws, Book 29 App.

Rule 8.4. Misconduct

Currentness

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

[4] A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid. As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling.

[4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

Notes of Decisions (834)

Rules of Prof. Con., Rule 8.4 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 8.4
Current with amendments through March 15, 2019.

End of Document

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Appendix
Rules of Professional Conduct [eff. April 1, 2009, As Amended to March 15, 2019.] (Refs & Annos)
Client-Lawyer Relationship

Rules of Prof. Con., Rule 1.1 McK.Consol.Laws, Book 29 App.

Rule 1.1. Competence

Currentness

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

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

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 associate 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. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[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 kinds 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] [Omitted.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

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 may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Retaining or Contracting with Lawyers Outside the Firm

[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 should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (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 needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside 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.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyer 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 about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, of a lawyer retains an outside lawyer or law firm to work under the lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

Editors' Notes

PRACTICE COMMENTARIES

by Professor Patrick M. Connors

Subdivision (a)

C1.1:1 The Rule of Competence

C1.1:2 Examples of Incompetent Representation

C1.1:3 Competence Compared with Standard of Care in Legal Malpractice Action

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C1.1:9 Failure to Seek Objectives of the Client

C1.1:10 Prejudicing or Damaging the Client During the Course of the Representation

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Subdivision (a)

C1.1:1 The Rule of Competence

Rule 1.1(a) states that "[a] lawyer should provide competent representation to a client." "Competent representation" is, in turn, defined to require "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1(a). The competence requirement is appropriately housed at the outset of the Rules, as it is central to the practice of law. The legal profession must ensure that the services it offers to the public are provided in a competent fashion. As noted by the First Department, "an attorney is

obligated to know the law relating to the matter for which he/she is representing a client and it is the attorney's duty, 'if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner.' " *Reibman v. Senie*, 302 A.D.2d 290, 291, 756 N.Y.S.2d 164, 165 (1st Dep't 2003).

Comment 1 to Rule 1.1 acknowledges that the required level of skill is normally that of a general practitioner. This is similar to the standard of care applicable to a lawyer in a legal malpractice action, which requires that the client demonstrate "that an attorney failed to exercise 'the ordinary reasonable skill and knowledge' commonly possessed by a member of the legal profession." *Darby & Darby, P.C. v. VSI Int'l, Inc.*, 95 N.Y.2d 308, 313, 716 N.Y.S.2d 378, 380 (2000); *see* Practice Commentary C1.1:3, below. In sum, competence does not require excellence. Rather, it requires a reasonable level of knowledge, skill and preparation for the representation at issue.

There are several factors that are considered in measuring whether a lawyer has provided competent representation. These include the complexity of the matter, whether the matter requires specialized knowledge in a particular area of the law, the lawyer's practice experience and training in the general subject matter of the representation, the preparation the lawyer can devote to the matter under the time constraints imposed by the client, and whether the lawyer can associate with another lawyer who is competent in the relevant field. *See* Comment 1 to Rule 1.1; *see also* Rule 1.1(b). While Rule 1.1(a) states a uniform standard of competence, the application of these factors will sometimes yield different results when applied to different lawyers. For example, if a lawyer has a broad range of experience and training in the area in question, and has communicated this expertise to the client, it may be appropriate to hold the lawyer to a higher level of competence in the matter in question. *See* Comment 1 to Rule 1.1; Restatement (Third) of Law Governing Lawyers § 52 cmt. d ("a lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely").

The effort required to achieve competence will also vary depending on the nature of the subject matter of the representation. As noted in Comment 5 to Rule 1.1, "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem." The scope of the necessary inquiry and analysis can vary widely depending upon the nature of the legal issues that are at the heart of the representation. The preparation necessary to achieve competence will also depend on the stakes involved. Obviously, "major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence." Rule 1.1, Comment 5.

The lawyer may limit the scope of the representation of the client provided, among other things, that the client gives an informed consent. Rule 1.2(c); *see* Practice Commentary Rule 1.2, C1.2:6. "Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.2, Comment 7.

As in the legal malpractice context, competence should be measured at the time of the representation, and not at some future moment when once debatable and questionable points are settled. *See Darby & Darby, P.C.*, 95 N.Y.2d at 313, 716 N.Y.S.2d at 381 ("What constitutes ordinary and reasonable skill and knowledge cannot be fixed with precision, but should be measured at the time of representation."). Attorneys should, however, keep abreast of the law and "familiarize themselves with current legal developments so that they can make informed judgments and effectively counsel their clients." *Id.* at 314, 716 N.Y.S.2d at 382; *see* Rule 1.1, Comment 6. The continuing legal education requirements imposed by 22 N.Y.C.R.R. Part 1500 ("Mandatory Continuing Legal Education Program for Attorneys in the State of New York") do not guarantee that a lawyer

will act competently in all representations, but the failure to satisfy these requirements for several years might be relevant to whether the lawyer has acted competently in a particular matter.

C1.1:2 Examples of Incompetent Representation

The failure to provide competent representation arises in a broad array of situations. It is helpful to note a few of the more common instances in which a competence problem arises. For example, a lawyer who agrees to bring an action on behalf of a client, but fails to satisfy the statute of limitations, violates the hortatory provisions in Rule 1.1(a). *See also* NYSBA Op. 275 (1972) (concluding that lawyer has affirmative obligation to inform client of failure to act competently in these circumstances). While the lawyer will not be subject to discipline under Rule 1.1(a), she can certainly be liable for legal malpractice. *See* Practice Commentary C1.1: 3, below.

If a lawyer represents a client in a matrimonial matter, she should discuss with the client matters relating to equitable distribution, support, visitation, and custody and emphasize their significance. "Where the lawyer has obtained only a divorce decree without attempting to resolve these other problems, a serious question arises as to whether he has represented his client competently." NYSBA Op. 425 (1975).

The obligation to provide competent representation requires the lawyer "to avoid accepting more matters than the lawyer can competently handle, and a duty to reduce one's workload if it has become unmanageable." NYSBA Op. 751 (2002). This long standing problem arises in a broad array of practice areas including those involving legal services lawyers, prosecutors, governmental lawyers and litigators. "[T]he lawyer may not justify neglecting a matter, preparing inadequately, or otherwise performing incompetently on the ground that the lawyer had too many matters to handle." *Id.*, n.1. Furthermore, while it may present many practical difficulties, a subordinate lawyer has an independent obligation to determine whether particular conduct comports with the duty of competence in Rule 1.1 and whether the lawyer is competent to handle matters the lawyer has been assigned. *Id.*; *see* Rule 5.2(a) ("A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person").

C1.1:3 Competence Compared with Standard of Care in Legal Malpractice Action

Rule 1.1(a)'s pronouncements on competence dovetail with the standard of care applicable in a legal malpractice action, which measures whether a lawyer's conduct can result in civil liability. The New York State pattern jury instruction on legal malpractice provides:

> An attorney who undertakes to represent a client impliedly represents that (he, she) possesses a reasonable degree of skill, that (he, she) is familiar with the rules regulating practice in actions of the type which (he, she) undertakes to bring or defend and with such principles of law in relation to such actions as are well settled in the practice of law, and that (he, she) will exercise reasonable care. Reasonable care means that degree of skill commonly used by an ordinary member of the legal profession.

NY PJI 2:152 Malpractice-Attorney.

The courts have repeatedly stated that the violation of a Rule of Professional Conduct, standing alone, will not "create a duty that gives rise to a cause of action that would otherwise not exist at law." *Shapiro v. McNeill*, 92 N.Y.2d 91, 97, 677 N.Y.S.2d 48, 50 (1998). As noted in the "Preamble" section of the New York Rules of Professional Conduct, the "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Preamble: Scope, para. 12. Therefore, while the violation of a Rule of Professional Conduct is some relevant evidence of legal malpractice, it does not necessarily constitute legal malpractice. *See Swift v. Choe*, 242 A.D.2d 188, 194, 674 N.Y.S.2d 17, 21 (1st Dep't 1998) ("it is not an alleged violation of the disciplinary rules that forms the basis

of the malpractice claim, although some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice").

Oddly, Rule 1.1(a)'s duty of competence is not expressed in mandatory terms. *See* Practice Commentary C1.1: 4, below. If an attorney does not comply with this aspirational ethical rule, however, she almost certainly has violated the standard of care owed to the client in the legal malpractice realm, and may be subject to damages if the other elements of a legal malpractice claim are established. *See* NY PJI 2:152 Malpractice-Attorney, Comment, sections C and D. Despite the fact that Rule 1.1 states the duty of competence in aspirational terms, a lawyer can still be subject to civil liability for even a single act of incompetence. *See* NY PJI 2:152 Malpractice-Attorney.

C1.1:4 "Should" vs. "Shall"

ABA Model Rule 1.1, which is the genesis for the New York Rule, states that a lawyer "*shall* provide competent representation." (emphasis added). The New York courts opted to make the "competent representation" rule aspirational, rather than mandatory. This change was recommended by the New York State Bar Association ("NYSBA") to reflect the "practice of disciplinary authorities," which rarely prosecute isolated and careless instances of incompetence, lack of zeal, or damage to a client. *See* NYSBA Proposed Rules of Professional Conduct, February 1, 2008 ("NYSBA Report"), p. 12.

It is important to note, however, that the rule proposed by the NYSBA was accompanied by a provision that did make incompetent representation a disciplinable offense if it was provided "intentionally, recklessly or repeatedly." NYSBA Report, p. 10. Unfortunately, that language was not ultimately adopted by the courts. The absence of this explanatory language in Rule 1.1(a) will doubtless make it more difficult to discipline lawyers who repeatedly fail to provide competent representation, one of the most common complaints registered by clients. It is possible that a lawyer who has failed to provide competent representation has violated Rule 1.1(b). *See* Practice Commentary C1.1: 6 & 7, below. Furthermore, in appropriate circumstances, Rule 8.4(h), which states that "a lawyer or law firm shall not ... engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer," could provide grounds to impose discipline on a lawyer who fails to provide competent representation.

Subdivision (b)

C1.1:5 Must a Lawyer "Associate" With Another Lawyer?

Rule 1.1(b) requires a lawyer to associate herself with another lawyer if "the lawyer knows or should know that the lawyer is not competent to handle [the matter]." This provision applies an objective standard of competence. Therefore, even if the lawyer is not personally aware that she is incompetent to handle a matter, she can be disciplined under Rule 1.1(b) if she should have known of the incompetence.

On its face, this subdivision appears to be quite expansive, requiring the lawyer to associate herself with another lawyer in any instance in which she has no prior experience in the subject matter of the representation. In actual practice, however, the subdivision will likely have a limited application.

As the Comments reflect, competence can be achieved in many different ways short of actually associating with a lawyer who is competent in the field. For example, it is well recognized that lawyers can achieve competence through research and self study in a particular discipline within the law. As noted in Comment 4 to Rule 1.1, "[a] lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter."

For those newly admitted to the bar, or those with a limited practice area, the Comments thankfully acknowledge that

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 .... A lawyer can provide adequate representation in a wholly novel field through necessary study.

Rule 1.1, Comment 2.

If a lawyer intends to achieve competence in a matter through research and study, the client should be placed on notice of that fact. The preparation required cannot result in an unreasonable charge to the client, or the fee would likely be deemed excessive. *See* Rule 1.5(a) (prohibiting excessive fees and expenses). If the lawyer plans to become competent in the matter at the outset of the representation, it may be appropriate to charge a reduced fee in recognition of the fact that the lawyer will likely expend more time on the matter than a lawyer who is already competent within the field. This may be desirable to a client who wishes to retain her regular lawyer on a new matter, rather than forming a new relationship with another lawyer.

Any preparation necessary to achieve competence must be performed diligently, thoroughly, and within the time frames required by the particular matter. *See* Rule 1.3(a) (mandating that the lawyer act with reasonable diligence and competence in representing a client). Therefore, if the client's matter requires prompt action in an area of the law in which the lawyer is not competent, it is unlikely that the lawyer could achieve competence through substantial self study. *See* Rule 1.1, Comment 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.").

C1.1:6 "Associating" With a Competent Lawyer

If a lawyer is not competent to handle a matter, and does not cure the incompetence through preparation and study, *see* Practice Commentary C1.1:5, above, Rule 1.1(b) requires the lawyer to associate herself with another lawyer who is competent to handle the matter. This can be accomplished in several ways.

If the lawyer handling the matter is in a firm in which a partner or associate is competent in the particular field, that can satisfy the dictates of Rule 1.1(b). Additionally, if the competent lawyer has an "of counsel" relationship with the firm, or is a part-time lawyer at the firm, Rule 1.1(b) can be satisfied. In these instances, client consent to associate with the competent lawyer would generally not be necessary because the client is hiring the law firm and confidential information can normally be shared among lawyers working at the firm. Rule 1.6, Comment 5 ("lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers").

The lawyer handling the matter could also satisfy Rule 1.1(b) by associating with a competent lawyer outside her firm. In that instance, however, the lawyer will normally be required to obtain the client's consent to share the client's confidential information with the competent lawyer. *See* Rule 1.6(a)(1) (requiring lawyer to obtain client consent to reveal confidential information); *see also* Rule 7.3(a)(2)(v) (prohibiting a lawyer from engaging in solicitation "if the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel"). Furthermore, if the lawyer handling the matter plans to split fees with the competent lawyer, the requirements of Rule 1.5(g) must be satisfied. These include, among other things, that "the client agrees to the employment of the other lawyer after a full disclosure that a division of fees will be made." Rule 1.5(g)(2).

In either of the above instances, the lawyer handling the matter must work closely with the competent lawyer to satisfy the requirements of Rule 1.1. In this regard, the term "associating" in Rule 1.1(b) is somewhat misleading. A mere casual association will not do. For example, a lawyer could not seriously contend that she satisfied Rule 1.1(b) simply because a partner in her firm, quite possibly in a distant satellite office, was competent to handle the matter. Rather, the competent lawyer must work closely with the lawyer handling the matter to ensure that competent representation of the client is achieved. As noted in NYSBA Op. 762 (2003),

The presence of another lawyer in the firm competent to handle the matter does not absolve the first lawyer of the obligation under DR 6-101[predecessor to Rule 1.1(b)] unless he or she actually consults with the second lawyer. Therefore, a New York firm should assure itself that all lawyers (including lawyers licensed only in foreign countries) working in the New York office are competent to handle matters undertaken by them, and if not, to have in place a procedure for consultation with a lawyer who has competence in the area.

Finally, necessary preparation may require the lawyer handling the matter to associate with professionals in other disciplines, such as accountants. Similarly, in a medical malpractice action, "competent representation includes the lawyer's duty to render the customary services in selecting and working with appropriate expert witnesses." NYSBA Op. 572 (1985).

C1.1:7 Rule 1.1(a) vs. Rule 1.1(b): Failure to Provide Competent Representation vs. Failure to Associate with a Competent Lawyer

It is difficult to make sense of the dichotomy between the hortatory instructions in the competence provision in Rule 1.1(a) and the mandatory dictates in Rule 1.1(b). Although not entirely satisfactory, one possible way to reconcile the provisions is as follows. Rule 1.1(a) applies to the lawyer who is generally competent to handle the client's matter, but who fails to provide competent representation. For example, a lawyer competent in medical malpractice actions might fail to thoroughly prepare the client's medical malpractice action, resulting in its dismissal. That would constitute a failure to adhere to Rule 1.1(a), but because of the hortatory nature of that provision, the lawyer would not be subject to discipline. If, however, a lawyer handling such a matter knew or should have known that she was not competent in medical malpractice actions, failed to become competent through necessary study, and failed to properly associate with a lawyer who was competent to handle the matter, the lawyer would be in violation of Rule 1.1(b), which is mandatory in nature. The latter lawyer would, therefore, be subject to discipline.

It should be noted that in either instance above, the lawyer can be subject to civil liability for legal malpractice. *See* Practice Commentary C1.1:3 ("Competence Compared with Standard of Care in Legal Malpractice Action"), above.

C1.1:8 The Emergency Exception to Competence

It is 2 A.M. on a cold Sunday morning and a lawyer awakes to the sound of her phone ringing. She initially believes the call is from one of her antitrust clients, or from a beleaguered associate at her firm working around the clock on an antitrust matter. Instead, the call is from a neighbor who has just been arrested for drunk driving. The neighbor notes that he has tried to contact several criminal defense lawyers with no success, and beseeches the neighbor to agree to represent her and come to the jail to assist her in dealing with the police. Assuming that the antitrust lawyer has never handled a criminal matter and is incompetent in that realm, can she assist her neighbor who cannot find another lawyer?

Comment 3 to ABA Model Rule 1.1 notes that:

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.

Despite her incompetence in criminal matters, this emergency exception would permit the antitrust lawyer to provide some sort of limited representation to the neighbor during the scope of the emergency. Therefore, if the antitrust lawyer did assist the neighbor in the wee hours of the morning, shortly thereafter she would need to cure her incompetence in criminal matters through research and study, or by associating with a lawyer who is competent to handle the matter. In lieu of these alternatives, the lawyer could attempt to withdraw from the matter, which might require the permission of a tribunal. *See* Rule 1.16(d).

Although a Comment 3 was initially included in the NYSBA Report, it is now designated as "Reserved." Does that mean that the emergency exception is not available under New York's Rule 1.1? While not spelled out clearly, the exception can likely be invoked under the Rule. The relevant factors to be considered in determining competence include "the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." Rule 1.1, Comment 1. In an emergency, the lawyer will have little time to prepare the matter and may be unable to associate with another competent lawyer on short notice. Those factors should be considered in determining if the lawyer responding to a client's emergency acted in conformance with Rule 1.1's competence standards.

Subdivision (c)

C1.1:9 Failure to Seek Objectives of the Client

Rule 1.1(c)(1) provides that "[a] lawyer shall not intentionally fail to seek the objectives of the client through reasonably available means permitted by law and these Rules." This subdivision has limited application. It applies only where: 1) the lawyer is aware of the objectives of the client, *see* Rule 1.4(a)(2) (requiring a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"), 2) there are reasonably available means to achieve these objectives that are permitted by law and the Rules of Professional Conduct, and 3) the lawyer intentionally fails to seek those objectives.

Therefore, a lawyer who carelessly or negligently fails to seek the client's objectives does not violate this provision. In addition, if the objectives of the client are not achievable through reasonably available means, the lawyer need not pursue them. A lawyer need not, for example, pursue a scorched earth strategy in discovery, even if the client agreed to pay for it and the demands would not be frivolous. This type of strategy is not a "reasonably available means" to pursue the client's objectives. If accomplishing the client's objectives require the lawyer to violate the law or the Rules of Professional Conduct, that provides an independent basis for the lawyer to refuse to pursue them. *See also* Rule 1.4(a)(5) (requiring a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law").

C1.1:10 Prejudicing or Damaging the Client During the Course of the Representation

Rule 1.1(c)(2) states the obvious: a lawyer cannot intentionally prejudice or damage the client during the course of the representation. While this provision does not apply to a lawyer who negligently harms the client, that type of conduct may lead to a violation of other Rules. *See, e.g.*, Rule 1.3 (requiring, among other things, that a lawyer act with reasonable diligence and promptness in representing a client and refrain from neglecting a client's matter). Furthermore, if the lawyer intentionally prejudices or damages the client during the course of the representation, she is subject to liability in a civil action for legal malpractice and/or breach of fiduciary

duty. *See also* Judiciary Law § 487 (permitting an injured person to recover treble damages against an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" or who "[w]ilfully delays his [or her] client's suit with a view to his [or her] own gain").

The Rule contains an important caveat that permits the lawyer to prejudice or damage the client if it is "permitted or required" by the Rules of Professional Conduct. There are many instances in which such conduct is authorized. For example, a lawyer is permitted to reveal or use confidential information to the extent necessary to prevent the client from committing a crime or to comply with a law or court order. Rule 1.6(b)(2), (6). If a lawyer operates under one of these exceptions to the duty of confidentiality, she will often simultaneously prejudice the client. Additionally, if a lawyer is required to disclose a client's fraudulent conduct to a tribunal under Rule 3.3(b), she will no doubt cause damage to the client's case. If the acts that prejudice or damage the client are authorized under some other provision in the Rules, the lawyer can proceed without fear of violating Rule 1.1(c)(2).

The restrictions in Rule 1.1(c)(2) only apply "during the course of the representation." If representation of the client has concluded, a lawyer may damage or prejudice the former client as long as the requirements in Rule 1.6 pertaining to confidentiality and the duties to former clients outlined in Rule 1.9 are honored.

Notes of Decisions (40)

Rules of Prof. Con., Rule 1.1 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 1.1
Current with amendments through March 15, 2019.

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