

## Professional Responsibility

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# Duty of Care & Civil Liability

## 1 Duty of Care to Client

### 1.1 Competence

#### Rule 1.1

“Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.”

- Required proficiency is usually that of a general practitioner in the jurisdiction

Example: L represented A in the case of A v. B. B prevailed at the trial court. Under the applicable rules, A has 30 days to file a notice of appeal. Because of a vacation and a busy schedule, L failed to comply with the 30-day deadline and A is now barred from pursuing an appeal. If the appeal had been filed, A would have prevailed.

- L is subject to discipline and subject to civil liability (i.e., malpractice).

#### 1.1.1 Achieving Competence

##### Consultation with other lawyers

A lawyer may be required to consult with another lawyer if the matter calls for some specific expertise, such as patent law or admiralty, that the ordinary lawyer does not possess - Note: fee-splitting with attorneys outside the lawyer's firm requires written consent of the client (infra).

##### Consultation with non-lawyer experts

A lawyer may retain a “consulting expert” in a field other than law to assist the lawyer in representing a client

- Consulting expert's opinions, etc. are generally protected from disclosure under FRCP 26
- Consulting expert can sit at counsel table, attend depositions, attend settlement negotiations, etc.

##### Study and research

- A lawyer should engage in continuing study and education of the law, even if not compulsory
  - Formal CLE is not required by the Rules, but is required by most state bars

### 1.1.2 Emergencies

A Lawyer may give advice or assistance on issues on which the lawyer is not fully competent, where the client faces an emergency

But the lawyer should refer the client to a competent lawyer or associate with a competent lawyer as soon as practical; the lawyer should also limit emergency advice to that reasonably necessary

Example: A tax lawyer may assist a client with bail for a DUI at 2:00 a.m. when no other lawyers are available, but should refer the case to another lawyer as soon as practical.

- If the tax lawyer mishandles the bail issue, the lawyer will probably not be disciplined, because it was an emergency.

### 1.1.3 Declining representation

A lawyer must decline representation if the lawyer believes that she is not (and cannot become) competent to effectively represent the client

## 1.2 Diligence

### Rule 1.3

Opposition, obstruction, and personal inconvenience to the lawyer do not relieve the lawyer of this duty

A lawyer breaches this duty even if the lack of diligence does not harm the client

A lawyer may agree to ordinary continuances, etc., where the client will not be prejudiced (even if the client generally opposes delays)

Example: L repeatedly fails to meet discovery deadlines for no legitimate reason. Although her clients are not injured by such actions, L would be subject to discipline.

## 1.3 Communication

### Rule 1.4

Lawyer must promptly respond to client requests for information

Lawyer must keep client informed (even absent a request by client) about:

- Status of the matter
- Decisions requiring the client's consent
- Limitations on the lawyer's conduct mandated by the Rules

### Examples

Lawyer for defendant serves discovery requests on lawyer for plaintiff. Lawyer must promptly notify client and provide copies of the requests.

Lawyer for defendant makes settlement offer to lawyer for plaintiff. Lawyer must promptly notify client, even if lawyer believes offer is inadequate, unless client has previously told lawyer such an offer would not be acceptable.

- Decision whether to accept settlement or plea offer belongs to the client (see below)

Lawyer for plaintiff receives check from lawyer for defendant, representing amount of judgment or settlement. Lawyer must promptly notify client (and must deposit check in client trust account)

### **1.3.1 Provisions for Lawyer's Unavailability**

A solo practitioner should make arrangements for another lawyer to review files and contact clients in the event the solo practitioner suddenly becomes disabled or dies unexpectedly.

### **1.3.2 Delaying & Withholding Communication**

In extraordinary circumstances, a lawyer may delay communication if the lawyer believes the client may react imprudently (e.g., if a mental health worker has advised the attorney that the client may become violent or suicidal upon learning the information)

A lawyer must withhold information from a client if so ordered by the court (i.e., an "attorneys' eyes only" protective order)

## **1.4 Exercise of Judgment**

Rule 2.1

### **Problems**

Lawyer represents ABC Corp. ABC has a very good breach of contract action against one of its regular customers, XYZ Corp. ABC hires Lawyer to sue XYZ. Lawyer advises ABC's president that, "although you have a great lawsuit and I'm prepared to file the complaint, I do not think it is a wise business decision for you to sue a regular customer?"

- Did Lawyer act properly?

Lawyer represents A in a child custody dispute. A is the custodial parent of three children. A's former spouse, B, has filed the child custody suit in an attempt to obtain custody of the children. A is a heavy drinker and has had considerable difficulty raising the children. Lawyer advises A: "I think you should seek treatment for your drinking and attend some parenting classes."

- Did Lawyer act properly?

## **1.5 Evaluation for Use of Someone Other Than Client**

Rule 2.3

## Problems

Lawyer, a partner in the Smith Law Firm, represents ABC Corp. in tax matters. ABC works with other companies (“customers”) to reduce their income tax exposure. ABC has created a new type of transaction which purportedly has significant tax advantages. ABC would like to market this new transaction to its customers. In order to make the new transaction more appealing to customers, ABC has asked Lawyer to prepare an opinion letter in which Lawyer opines on the tax advantages. ABC will give this opinion letter to customers and potential customers.

- May Lawyer prepare the opinion letter?
- What should Lawyer do if she disagrees with ABC as to the tax advantages of the new transaction?

## 2 Civil Liability for Attorney Conduct

### 2.1 Liability to Clients

#### 2.1.1 Attorney Malpractice

##### Elements (similar to negligence)

- Breach of the duty of care
- Cause in Fact
- Proximate Cause
- Damages

##### Standard of Care

###### *Ordinary standard*

- Level of care similar to that of an ordinary, prudent general practitioner within the jurisdiction

###### *Specialist standard*

- Level of care of an ordinary, prudent specialist within the jurisdiction

##### Relevance of ethics rules

- The ethics rules do not establish the applicable standard of care, but are relevant in determining whether there has been a breach

#### 2.1.2 Other Potential Claims

- Breach of Contract
- Breach of Fiduciary Duty
- Fraud
- Intentional Torts
- Statutory Claims

## 2.2 Liability to Others

A lawyer may be liable to persons other than a client for harm resulting from lawyer's conduct

### Malpractice

- Third-party beneficiary of representation: e.g. beneficiary under a will or trust

### Fraud and other intentional torts

### Statutory claims

## 2.3 Professional Liability Insurance

Coverage is not mandatory. But some jurisdictions require that attorney inform client whether the attorney has coverage.

## 3 Ineffective Assistance of Counsel

Raised by a criminal defendant seeking post-conviction relief

Not a basis for attorney liability (though the same conduct may give rise to malpractice or other claims)

### Padilla v. Kentucky, 130 S.Ct. 1473 (2010)

Court restates the standard adopted in *Strickland v. Washington*

- Attorney did not provide competent representation
  - Representation “fell below an objective standard of reasonableness”
  - Based on “prevailing professional norms”
- Prejudice resulting from attorney's error
  - “[A] reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.”

Representation did not meet constitutional standard of competence where criminal defense lawyer's failed to advise client regarding immigration consequences of guilty plea

Court does not address the second prong (whether defendant was prejudiced).