2017 JOINT SPRING MEETING

GROUP LEGAL SERVICES ASSOCIATION

SOLO, SMALL FIRM, AND GENERAL PRACTICE DIVISION

STANDING COMMITTEE ON GROUP & PREPAID LEGAL SERVICES

MAY 18-20, 2017

SCOTTSDALE, ARIZONA

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e DISCOVERY PROCESSES & PROCEDURES: THE 'KNOW-HOW' WITH THE 'HOW-TO'

THURSDAY, MAY 18, 2017
3:30 – 4:30

PRESENTERS: JEFF ALLEN
KYLE SPARKS

Jeffrey Allen
Graves & Allen
Oakland, CA

Jeffrey Allen has practiced law in Oakland, California for over 43 years. His practice has included both litigation and transactional work, primarily in the fields of real estate, business and trust disputes. He has also taught at the University level in both graduate and undergraduate programs and in law school. He has actively involved himself in the implementation of technology into law practices throughout his career, including wring many articles about various aspects of technology and law, coauthoring four books on the subject and teaching innumerable CLE courses all over the United States on technology and the law. He founded the GPSolo Technology eReport and has been the editor in chief of the GPSolo Magazine and the GPSolo eReport for many years. He also authors a Road Warrior column for the magazine and a Tech column for the GPSolo eReport and also for the Voice of Experience (Senior Lawyer's Division). He has served many years as a member and as a Liaison to the ABA Standing Committee on Information Services and also as a member of the ABA Journal Board of Editors. He has received many honors and awards during his career, including: Acknowledgement as a "Superlawyer"; the GPSolo Division honored him with a Lifetime Achievement Award in 2016; the GPSolo Division also awarded him the 2017 GPSolo Trainer award. When the Uniform Law Commission created a drafting committee to develop a uniform set of eDiscovery Rules, Jeff was selected to serve as the ABA Advisor to the Drafting Committee.In addition to his license to practice law in California, Jeff has been admitted to the Rolls as a Solicitor of the Supreme Court of England and Wales."

Gregory McFarlane
ThomsonReuters
New York, NY

In my role I work with F1000 Corporations and law firms to increase accuracy and profitability by improving efficiency and productivity. Well versed in all aspects of litigation workflow, I focus on eDiscovery processes and software applications to help our clientbase overcome challenges of managing big data. Services in addition to litigation consulting include contract lifecycle management, risk management and regulatory compliance.

Ann. Mod. Rules Prof. Cond. § 1.1

Annotated Model Rules of Professional Conduct, Eighth Edition | 2015

American Bar Association
Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnarsson, Center for Professional Responsibility

CLIENT-LAWYER RELATIONSHIP

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 6.2.

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 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 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 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 1.2. 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, e.g.*, *People ex rel. Goldberg v. Gordon*, 607 P.2d 995 (Colo. 1980) (lawyer who treated corporation as tenancy in common among shareholders, then used 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) (lawyer failed to carry out essential adoption procedures); *Att'y Grievance Comm'n v. Colton-Bell*, 76 A.3d 1096 (Md. 2013) (lawyer failed to file habeas corpus petition, which was purpose of representation); *Commonwealth v. McDaniels*, 785 A.2d 120 (Pa. Super. Ct. 2001) (lawyer's brief grossly misstated client's crimes and relevant standard for withdrawal from representation); *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (lawyer erroneously believed statute of limitations in medical malpractice case would not run until after lawyer obtained opinion by client's treating physician that malpractice occurred); *Office of Disciplinary Counsel v. Henry*, 664 S.W.2d 62 (Tenn. 1983) (lawyer filed "answers" to one client's murder indictment, and filed civil rights suit for another client alleging libel by receipt of pornography in mail); *Martin v. Nw. Wash. Legal Servs.*, 717 P.2d 779 (Wash. Ct. App. 1986) (lawyer handling marriage dissolution did not inquire about, discuss, or seek division of client's husband's military pension). *See generally* American Bar Association, *Essential Qualities of the Professional Lawyer*, 105 *et seq.* (2013); 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, e.g.*, *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (criminal defense lawyer who "did no legal research" on client's case failed to comply with Rule 1.1); *Att'y Grievance Comm'n v. Sperling*, 69 A.3d 478 (Md. 2013) (lawyer's ""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); *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 Young*, 639 S.E.2d 674 (S.C. 2007) (lawyer disciplined for filing RICO counterclaim in answer to adversaries' suit without researching state predicate offenses upon which claim was based); *see also Horne v. Peckham*, 158 Cal. Rptr. 714 (Ct. App. 1979) (general practitioner drawing up trust failed to do basic research; "inadequate even for a general practitioner"). *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, e.g.*, *People v. Miller*, 35 P.3d 689 (Colo. O.P.D.J. 2001) (lawyer probating estate simultaneously filed documents for both formal and informal proceedings with probate court and never corrected paperwork); *Burton v. Mottolese*, 835 A.2d 998 (Conn. 2003) (violation of Rule 1.1 found for, inter alia, "failure to cease speaking . . . when an objection was made"); *Ky. Bar Ass'n v. Trumbo*, 17 S.W.3d 856 (Ky.

2000) (lawyer filed defective separation agreement without proper notarization of husband's signature; decree of dissolution later set aside); *In re Martin*, 982 So. 2d 765 (La. 2008) (criminal defense lawyer failed to provide statement of admission to federal probation office, precluding significant reduction in sentencing); *Att'y Grievance Comm'n v. Nichols*, 950 A.2d 778 (Md. 2008) (lawyer failed to list personal injury case he had filed for client on schedule of assets in bankruptcy); *Ryan v. Ryan*, 677 N.W.2d 899 (Mich. Ct. App. 2004) (filing of complaint without required verification or supporting affidavits "calls into question the competence and good faith of the plaintiff's attorney"); *In re Fru*, 829 N.W.2d 379 (Minn. 2013) (lawyer's persistent failure to comply with immigration court orders and procedures over eight-year period 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 Obert*, 282 P.3d 825 (Or. 2012) (lawyer's filing notice of appeal, then untimely motions for judgment notwithstanding verdict and new trial, then second untimely notice of appeal, and inaction in face of 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) (lawyer demonstrated lack of understanding of basic legal procedure not only in multiple client matters but also in her pro se defense to disciplinary complaint); *In re Winkel*, 577 N.W.2d 9 (Wis. 1998) (lawyer failed to have client execute disclaimer required under father's trust, resulting in greater tax liability for estate); *cf. In re Phillips*, 766 A.2d 47 (D.C. 2001) (lawyer serving as executor of estate did not follow required trust accounting procedures and court orders).

• Court Rules

Violation of court rules may also constitute lack of competence under Rule 1.1. *See, e.g., Smith v. Town of Eaton*, 910 F.2d 1469 (7th Cir. 1990) (fining lawyer for poor appellate brief in violation of Federal Rule of Appellate Procedure 28(a)(4); "duty that the bar owes to this court is mirrored by counsel's duty to represent clients competently [under] Rule 1.1"); *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) (suspension for lawyer who represented client before U.S. circuit court without being admitted to that court, who misapplied rules governing federal appellate practice, and who repeatedly failed to comply with procedural requirements); *In re Harris*, 180 P.3d 558 (Kan. 2008) (lawyer promised client to file bankruptcy matter immediately but failed to obtain electronic filing account, thereby violating court's mandatory electronic filing rule); *In re Krause*, 737 A.2d 874 (R.I. 1999) (lawyer's failure to effectuate timely service of process demonstrated incompetence); *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (lawyer failed to serve defendant within thirty days of filing lawsuit, thereby risking dismissal of case). *But see Ky. Bar Ass'n v. Fernandez*, 397 S.W.3d 383 (Ky. 2013) (experienced lawyer did not demonstrate lack of knowledge or competence despite other ethics rule violations, including collecting fee of more than twice statutorily allowed amount without disclosing or seeking court's approval, in violation of court rules).

• Technology

Rule 1.1 requires a lawyer to have a basic understanding of the benefits and risks associated with relevant technology. Cmt. [8]; *see, e.g.*, ABA Formal Ethics Op. 11-459 (2011) (duty of competence requires lawyer to use reasonable care to protect confidentiality of client's electronic communications); Ala. Ethics Op. 2010-02 (n.d.) (lawyer storing client files in cloud must ascertain how cloud provider will store data and keep abreast of changes in technological security); Ariz. Ethics Op. 09-04 (2009) (duty of competence extends to computer security); Cal. Ethics Op. 2010-179 (2010) (lawyer must possess basic awareness of available security for electronic technology used in lawyer's practice or associate with someone who does); Fla. Ethics Op. 10-2 (2010) (lawyer must keep current with developments in technology to protect confidentiality of client information on electronic devices); N.H. Ethics Op. 2012-13/4 (2013) (lawyer must have basic understanding of technology and keep abreast of changes); N.Y. State Ethics Op. 842 (2010) (lawyer has duty to keep up with advances in technology used in law practice); Ohio State Bar Ethics Op. 2013-03 (2013) (opinion contains suggestions on how lawyer may competently store electronic client files in cloud); Pa. Formal Ethics Op. 2009-100 (2009) (duty of competence requires lawyer to ensure that client information in document metadata is not transmitted to opponent and determine whether metadata in documents received from opponent may be reviewed and/or used). *See generally* American Bar Association, *Essential Qualities of the Professional Lawyer*, 189 *et seq.* (2013); Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179 (2011); Jon M. Garon, *Technology Requires Reboot of Professionalism and Ethics for Practitioners*, 16 J. Internet L., no. 4, at 3 (Oct. 2012); Louise Lark Hill, *Technology--A Motivation Behind Recent Model Rule Revisions*, 40 N. Ky. L. Rev. 315 (2013); Michael McNerney & Emilian

Papadopoulos, *Hacker's Delight: Law Firm Risk and Liability in the Cyber Age*, 62 Am. U. L. Rev. 1243 (June 2013). For a discussion of e-discovery and the duty of competence, see Monica McCarroll, *Discovery and the Duty of Competence*, 26 Regent U. L. Rev. 81 (2013-2014).

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); *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) (lawyer's failure to do anything after retention but draft complaint having nothing to do with representation showed lack of competence); *In re Hawkins*, 502 N.W.2d 770 (Minn. 1993) (repeated disregard of local bankruptcy rules coupled with incomprehensibility of lawyer's written work due to numerous errors in spelling, grammar, and typing); *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) (lawyer filed quiet title complaint with incorrect legal description of realty and failed 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) (lawyer incorrectly advised that federal tax liens were dischargeable in bankruptcy); *In re Katz*, 981 A.2d 1133 (Del. 2009) (lawyer failed to realize and did not 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) (lawyer misrepresented holding of published opinion); *In re Black*, 941 P.2d 1380 (Kan. 1997) (lawyer's ""failure to properly learn, observe and apply the rules for calculating child support demonstrates a lack of competency"); *Lieber v. Hartford Ins. Ctr.*, 15 P.3d 1030 (Utah 2000) (lawyer's brief relied upon 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) (lawyer did not understand how federal sentencing guidelines applied to client's case); *see also* Cal. Ethics Op. 2003-162 (2003) (lawyer who personally advocated nonpayment of income tax is still competent to advise if those beliefs do not prevent her "from performing an objective evaluation of her client's legal position").

THOROUGHNESS AND PREPARATION

• 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 Dean*, 401 B.R. 917 (Bankr. D. Idaho 2008) (lawyer failed to investigate whether security interest in clients' motor home was perfected before filing bankruptcy petition); *People v. Boyle*, 942 P.2d 1199 (Colo. 1997) (lawyer failed to prepare adequately for hearing or to discover readily available evidence supporting asylum petition); *People v. Felker*, 770 P.2d 402 (Colo. 1989) (divorce lawyer prepared for hearing only on way to courthouse, then failed to consult with 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) (lawyer failed to contact any of four potential defense witnesses named by his client in criminal case); *Iowa Supreme Court Att'y Disciplinary Bd. v. Wright*, 840 N.W.2d 295 (Iowa 2013) (experienced lawyer's failure to conduct even cursory internet search or otherwise competently investigate and analyze Nigerian internet scam violated Rule 1.1); *In re Rathbun*, 169 P.3d 329 (Kan. 2007) (criminal defense lawyer failed

to contact witnesses before bench trial or call any witnesses at trial); *Att'y Grievance Comm'n v. Chasnoff*, 783 A.2d 224 (Md. 2001) (plaintiff's lawyer in personal injury suit failed to visit scene of accident until two years afterward, attempt to locate witness who tried to help client on night of accident, attempt to preserve testimony of witnesses, or had client monitor his medical condition to document lack of improvement); *In re Rios*, 965 N.Y.S.2d 418 (App. Div. 2013) (lawyers failed to ask client about exact location of accident in non-suggestive manner); *In re Kovitz*, 504 N.Y.S.2d 400 (App. Div. 1986) (lawyer failed to investigate personal injury case for fourteen years, claiming it was trial tactic to outwait witnesses); *Toledo Bar Ass'n v. Wroblewski*, 512 N.E.2d 978 (Ohio 1987) (lawyer for estate 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); *Beard v. Bd. of Prof'l Responsibility*, 288 S.W.3d 838 (Tenn. 2009) (lawyer recommended 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) (lawyer failed to obtain information concerning 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) (lawyer signed, as attorney of record, complex pleadings forwarded to him 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) (lawyer learned, but failed to inform lender client, of existing mortgages on two properties); *Att'y Grievance Comm'n v. Christopher*, 861 A.2d 692 (Md. 2004) (probate lawyer learned of several suspect expenditures from estate's account by personal representative but did not report them in accountings to court); *In re Fett*, 790 N.W.2d 840 (Minn. 2010) (lawyer advised client agent under power of attorney to transfer principal's assets to himself without explaining possible consequences); *In re Fayssoux*, 675 S.E.2d 428 (S.C. 2009) (lawyer who handled twenty-eight closings of fraudulent realty transactions violated Rule 1.1 by not heeding "red flags" of fraud and proceeding with closings).

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) (lawyer disciplined under Rules 1.1 and 1.7 for accepting criminal defense matter though he was related to both victim and defendant); *Att'y Grievance Comm'n v. Zuckerman*, 944 A.2d 525 (Md. 2008) (lawyer who failed to ensure settlement and judgment monies were promptly accounted for and disbursed facilitated office manager's embezzlement and so violated Rules 1.1 and 1.15); *Cincinnati Bar Ass'n v. Lawson*, 891 N.E.2d 749 (Ohio 2008) (lawyer who failed 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) (lawyer disciplined under Rules 1.1, 1.7, and 1.8 for taking loan from trust he created for settlor and for which he was trustee); *In re Sturkey*, 657 S.E.2d 465 (S.C. 2008) (criminal defense lawyer disciplined under Rules 1.1 and 1.6 for having conversations with client within earshot of police officers); *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").

DELEGATION AND SUPERVISION

Because a lawyer is required to supervise subordinate lawyers and non-lawyer staff, the ethical obligation of competence cannot be avoided by referring a matter to another. *See In re Herbst*, 931 A.2d 1016 (D.C. 2007) (lawyer disciplined for allowing nonlawyer staff member to negotiate settlement of client's case); *Att'y Grievance Comm'n v. Zuckerman*, 944 A.2d 525 (Md. 2008) (lawyer disciplined for failing to supervise nonlawyer office manager in charge of client trusts, thus allowing her to embezzle client funds); *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) (lawyer's failure to timely file documents warranted finding of violation of Rule 1.1 notwithstanding assertions that lawyer 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 Ethics Op. 2007-1 (2007); Colo. Ethics Op. 121 (2009); N.C. Ethics Op. 2007-12 (2008). *See generally* Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance). *But see In re Wilkinson*, 805 So. 2d 142 (La. 2002) (lawyer disciplined under Rule 5.1 for failure to supervise work of law clerk, but no Rule 1.1 violation found).

INEXPERIENCE

• New Lawyers

Lack of competence may be a particular problem for the new or inexperienced lawyer. *E.g.*, *Lewis v. State Bar*, 621 P.2d 258 (Cal. 1981) (Bird, C.J., concurring) (new lawyer completely unfamiliar with probate law failed to prepare inventory or tax returns; concurring opinion noted that ""burden of [Rule 6-101 of the Model Code] unfortunately appears to fall disproportionately on younger members of the legal profession who begin their careers as solo practitioners"); *In re Landrith*, 124 P.3d 467 (Kan. 2005) (affirming discipline despite recognizing that "at the time Respondent first engaged in misconduct, he had only been practicing law for 4 months. He was certainly inexperienced"); *In re Martin*, 982 So. 2d 765 (La. 2008) (lawyer disciplined for mishandling first federal criminal defense case; lawyer's inexperience cited as factor in mitigation of discipline); *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 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers).

• 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 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 Deardorff*, 426 N.E.2d 689 (Ind. 1981) (new lawyer who told judge he had "no idea how to proceed" in joint will litigation should have asked for help instead of lying to clients for three years about case's status); *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 v. Kendrick*, 943 A.2d 1173 (Md. 2008) (lawyer refused "to admit to her ignorance of the probate procedures involved or to seek and accept help from qualified legal professionals in getting her problems resolved. Her stubbornness over the past eight years to find the guidance necessary to close the Estate amounts to incompetence"); *In re Kaszynski*, 620 N.W.2d 708 (Minn. 2001) (lawyer's ignorance of immigration law and procedures and failure to supply documentation required to support clients' claims for relief put clients in danger of deportation); *State ex rel. Counsel for Discipline v. Orr*, 759 N.W.2d 702 (Neb. 2009) (experienced lawyer should have recognized specialized nature of franchising law and performed research necessary to become competent); *In re 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); *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) (lawyer participating in Groupon or deal-of-the-day arrangement must limit offer to services and areas in which lawyer is competent); N.C. Ethics Op. 2010-6 (2011) (lawyer may advertise for matters in legal areas in which he is inexperienced only if advertisement includes statement that lawyer will associate with experienced lawyer); 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). *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").

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," to the extent the lawyer must spend excessive amounts of time preparing for tasks that with experience become routine, the lawyer should not expect the client to pay for the lawyer's education, *In re Estate of Larson*, 694 P.2d 1051 (Wash. 1985) (en banc), 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 1.5 (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) (lawyer's representation of murder defendant whose conviction was vacated on ground of ineffective assistance involved "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) (lawyer's 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 APPOINTED 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 6.2.

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) (lawyer who ran "high-volume operation" of criminal defense cases disciplined under Rules 1.1 and 1.3 for neglect of several clients' matters).

Excessive caseloads can be a significant problem for public defenders, 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. *See* 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); American Bar Association, *Eight Guidelines of Public Defense Related to Excessive Workloads* (Aug. 2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_sclaid_revised_rpt_119_eight_guidelines.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 her 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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