Understanding the "knowledge" requirement of attorney competence: A roadmap for novice attorneys

Sabis, Christopher

INTRODUCTION

The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.

I. BACKGROUND

The legal profession has only recently progressed from having no professional standard concerning attorney competence to having comprehensive codes of increasing specificity and complexity. Only thirty years ago, competence was not an express part of an attorney’s professional responsibility, and competence was enforced solely through legal malpractice actions. The Canons of Professional Ethics (Canons) did not contain a single provision dealing directly with incompetence, and there were few attempts to impose professional discipline on lawyers for incompetence. Thus, in Friday v. State Bar, a case decided under the original Canons, the California Supreme Court concluded that:

Mere ignorance of the law in conducting the affairs of his client in good faith is not a cause of discipline. The nearest approach to such conduct is negligence as a ground for discipline when the neglect is so serious as to constitute a violation of his oath as an attorney.
The absence of a professional rule of competence could be traced to the view that a lawyer who had successfully completed a bar examination and met other basic entrance criteria was, by definition, competent to practice law. Thus, the profession did not explicitly require lawyer competence until 1970, when jurisdictions began adopting versions of the Model Code of Professional Responsibility (Model Code).

A. COMPETENCY UNDER THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY

throughout their careers. Thus, Canon 6 stated that, "a lawyer should act with competence and proper care in representing clients. He should strive to remain and become proficient in his practice and should accept employment only in matters which he is or intends to be competent to handle."

The Model Code rejected the notion that passing the bar was itself evidence of competence and instead stressed that maintaining competence was an ongoing endeavor. Therefore, Canon 6 states that, "[w]hile the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified."

The Model Code, however, did not provide a substantive definition of lawyer competence. Instead, Disciplinary Rule (DR) 6-101 (A), simply stated that:

A lawyer shall not:

1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer that is competent to handle it.

2) Handle a legal matter without preparation adequate in the circumstances.

3) Neglect a legal matter entrusted to him.

DR 6-101(A) was qualified by Ethical Consideration (EC) 6-3, which stated that a lawyer who is not qualified in a certain area of law may accept employment in that field if:

in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in an unreasonable delay or expense to his client... A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent
of his client, accept the employment and associate a lawyer who is competent in the matter. 17

was primarily concerned with a lack of diligence rather than with competence.19 For these reasons, the Model Code was criticized as being "unresponsive to the realities of modern practice."2 Consequently, in 1977 the ABA appointed a committee to redraft the Model Code.21

B. COMPETENCE UNDER THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY

The ABA attempted to remedy some of the problems of the Model Code in its promulgation of the Model Rules.22 The first rule, Model Rule 1.1, addresses attorney competence.23 It states that, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."24 The comments to Model Rule 1.1 provide much of the substance of the rule. Comment 1 focuses on the legal knowledge and skill requirements and lists factors relevant to the determination of whether the attorney has attained the requisite knowledge.25 Such factors include: the level of specialization or complexity of the legal matter in question; the attorney's training and experience in general and in the specific field; the amount of preparation and study time the attorney can devote to the matter; and whether the attorney can consult with another attorney who is competent in the particular field.26 In addition, to maintain competence, the comments state that an attorney must participate in continuing legal education programs and should utilize peer review systems if available and appropriate.

knowledge before taking on a matter. Rather, the Model Rule's requirements can be met if the attorney can consult another attorney with relevant knowledge and experience, or the attorney can acquire the knowledge through preparation and study.211 In addition, in an emergency situation, an attorney without the necessary skill may still give advice on the matter, provided that the advice is limited to what is reasonably necessary.

Although Model Rule 1.1 imposes an enforceable duty of reasonable competence, it does not condone the second-guessing of attorney decisions, and lawyers are given much discretion as to legal technique.30 However, courts have interpreted both the Model Code and the Model Rules to require that attorneys be familiar with a wide range of types of legal knowledge.31 Under both of these standards, attorneys are expected to be familiar with well-settled principles of law; to find those additional rules of law that may be readily researched; to be aware of the rules of procedure; and to be knowledgeable of local court rules.32 The following Section explores each of these areas of knowledge.
II. TYPES OF LEGAL KNOWLEDGE

A. KNOWLEDGE OF LEGAL, PRINCIPLES AND RULES

part of [Gordon] of basic operating facts and principles of law ... evidence[d] a total lack of understanding of fundamental principles essential to the practice of law."36

Similarly, under the standard of Model Rule 1.1, the Supreme Court of Kansas found that attorney Farmer violated his ethical duty of competence because he did not understand or apply the principles of bankruptcy law.37 The court noted that the respondent did not understand the difference between secured and unsecured creditors or basic legal and jurisdictional issues.38 The court cited numerous instances of demonstrated failure to understand and apply the law.39 As a result, the court indefinitely suspended Farmer from the practice of law for violating Model Rule 1.1.40

Courts will also expect attorneys to be aware of applicable statutes of limitations.41 For example, in In re Moore, attorney Moore erroneously believed that statute of limitations in a medical malpractice case would not run until after the lawyer obtained an opinion by his client's treating physician that malpractice occurred.42 The Supreme Court of South Carolina, applying Model Rule 1.1, found that Moore "demonstrate[d] a lack of understanding of the statute of limitations and the discovery rule [that was] evidence of incompetency."43 The court noted that the general sanction for the neglect of client matters is a public reprimand.44 However, because of the degree to which his clients were prejudiced in failing to file within the statute of limitations and for other violations, Moore was suspended from practice for one year.

by Lecznar's cooperative attitude and lack of dishonest or selfish motive 48

B. BASIC RESEARCH

In addition to knowledge of general legal principles, an attorney must also conduct research necessary to find those specific rules bearing on their client's matters. For example, in Oklahoma State Bar v. Hensley, attorney Hensley failed to understand and apply the intestacy laws of the state of Oklahoma.49 Hensley was unaware that her client's son was heir to his father's estate even though the father had been denied his parental rights.50 As a result, the court, applying the Model Code, disbarred her for this and other violations.51 The court noted that "[a] cursory examination of the statutes of Oklahoma would have further revealed to Respondent that a
distribution of the estate to the minor heir's mother was not authorized by law."52 Thus, "[h]er unexplained failure to ascertain what she knew to be basic and statutorily defined points readily ascertainable by any member of the bar constitutes the handling of a legal matter without preparation adequate in the circumstances."53

Similarly, in Baird v. Pace, attorney Baird was found to have committed negligent malpractice in failing to research how to perfect a security interest in a liquor license.54 The court stated the rule as follows: "[An attorney] must discover those additional rules of law which although not commonly known, may be readily found by standard research techniques."55 As a result, the Arizona appeals court upheld the lawyer court's award of damages against Baird.56

C. KNOWLEDGE OF PROCEDURE

written disclaimer of her husband's assets."60 As a result, the estate incurred greater tax liability.61 Winkel was publicly reprimanded for his professional misconduct and ordered to pay the costs of the disciplinary proceeding.62 Similarly, in In re Gallegos, attorney Gallegos failed to apply for a supersedeas bond in a divorce proceeding or to take steps to enforce a judgment during the pendency of an appeal.63 Once the case was remanded, Gallegos advised the judge that "he had no idea how to proceed."64 As a result, Gallegos' client was forced to incur additional legal fees in an attempt to gain possession of what was rightfully hers.65 The Supreme Court of New Mexico found Gallegos' action in violation of its rules of professional competence.66 For this and other violations, Gallegos was disbarred and required to pay the costs of the action.67

D. KNOWLEDGE OF COURT RULES

Finally, a lawyer is also expected to know the rules of the courts before which the lawyer practices.68 For example, in In re Moore, in contravention of local court rules, Moore failed to serve a defendant within thirty days after filing, thereby causing his client's appeal to be dismissed.69 As a result, the Supreme Court of South Carolina stated that Moore's mistaken belief that he was entitled to an automatic stay "was fatal to his client's action."70 In response to this and other violations, the court found that Moore had demonstrated a "detrimental pattern of neglect and incompetency," and suspended him from practice for one year.71

Similarly, in In re Dempsey, attorney Dempsey was suspended indefinitely for being unfamiliar with the rules of federal trial practice.72 Dempsey had failed to write motions according to local court rules and consistently
made improper objections to questions or testimony.\textsuperscript{73} The court, explaining the standard, noted the following:

before appearing in federal court. Such knowledge would be expected of any attorney of ordinary skill and learning who appeared before this court ... [Dempsey] should have associated himself with, or obtained the advice of the public defender or other competent attorney.\textsuperscript{74}

Because of Dempsey's failure to understand that his conduct was inappropriate, the court ordered him to take a course in professional responsibility, achieve a passing score on the Multistate Professional Responsibility Exam, and submit himself to the court at a later date to answer questions on the subject.\textsuperscript{75}

The importance of understanding one's obligation to meet the knowledge requirement of legal competence goes beyond ethical considerations and discipline. Competence and legal knowledge are not simply ethical duties; they are also legal duties. The legal practitioner should be aware that incompetence can serve as the basis for a malpractice action.\textsuperscript{76} Thus, the previous discussion of the legal knowledge requirement is even more relevant because courts have frequently referred to and applied both the Model Code and the Model Rules to determine whether an attorney has committed malpractice and breached his obligations to his client, the court, or the opposing party.\textsuperscript{77} To these courts, violation of those standards represents, at a minimum, evidence of negligence.\textsuperscript{71}

\textbf{III. PROBLEMS FOR NEW LAWYERS IN MEETING COMPETENCY REQUIREMENTS}

When an attorney, particularly a new or young attorney, faces a case, that attorney confronts many responsibilities. Perhaps the most important of these is for the attorney to determine if she is competent to perform the services requested. While this is often a simple evaluation for an experienced lawyer, new attorneys face a more difficult decision. With little or no experience, is there any case a new lawyer can accept and believe that she is competent? This Section will examine general competence issues, particularly as they are relevant to young or inexperienced attorneys, in the hope of providing some guidance for how to handle this important ethical dilemma. Part A of this Section will examine how competency rules contain inherent complications for young attorneys. Part B will illustrate that a lack of advanced knowledge about the law does not constitute a defense against competence charges, even when cases become more complex than one initially anticipates.
A. THE INHERENT PROBLEM WITH COMPETENCE RULES

It is often the case that, without consideration of further circumstances, the wording of a state's competence rule can cause difficulties for new attorneys since experience is essential to a lawyer's performance. This problem is apparent in Lewis v. State Bar of California. In Lewis, the Supreme Court of California considered a case where, in relevant part, an attorney "negligently and improperly conducted the administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney." The attorney in question, in addition to having no probate experience, was young and had no previous disciplinary record.

In spite of the apparent ease with which the court applied DR 6-101, Chief Justice Bird expressed some reservations about the implication of the rule and the court's decision. Chief Justice Bird, while fully concurring with the court's holding, wrote a concurrence in which he expressed his distress at the prospect of ending the practice of young attorneys entering the Bar as solo practitioners. In relevant part, Chief Justice Bird wrote:

While Chief Justice Bird may have been correct regarding the perils of young, solo practitioners, competence rules are important to new attorneys who practice in firms as well. The New Jersey Supreme Court confronted a competence related problem with a young attorney who worked for a twenty-attorney firm in In the Matter of Yacavino. Attorney Yacavino was a young lawyer who, after a short period in a solo private practice, joined a small New Jersey firm. Upon joining the firm, Yacavino began working on an adoption case that he anticipated to be an extremely simple project. However, for a year, Yacavino did nothing to advance the client's interests; the case became completely stagnant.

Even after Yacavino left the firm, he continued to work on some of the firm's cases, including the adoption case. However, the case remained undeveloped and, as the client began to place pressure on Yacavino, he
began down a path of deception. In the summer of 1982, Yacavino informed his client that the adoption had gone through, and later told them that the judge had signed the order. In fact, Yacavino had not done anything on the case and, in order to hide his lies, he wrote a fictitious order and "superimposed the signatures of a sitting judge of the vicinage on the orders."

The only defenses that Yacavino offered before the New Jersey Supreme Court were that he had not done anything with the goal of self-enrichment, that he had cooperated with the proper authorities once his deception came to light, and that this was an isolated incident. However, while clearly disturbed by Yacavino's actions, the court was more concerned by evidence that, "respondent was left virtually alone and unsupervised in the year that he serviced the firm's... office. The office was lacking the essential tools of legal practice.' Had this young attorney received the collegial support and guidance expected of supervising attorneys, this incident might never have occurred.

the practice of law for three years. The Court also ordered that Yacavino could only return to practice through an apprenticeship with a senior attorney.' It is clear that competence can be an important issue for both young solo attorneys and attorneys practicing at firms. Youth does not insulate anyone from charge of incompetence or negligence.

As important as it is for a new attorney to be conscious of competence issues, it is perhaps even more vital that a new attorney know how to react when she realizes that she is in the midst of a competence dilemma. In 1975, senior attorneys at Ellis, Gamble & Nolan assigned attorney Deardorff his first case. After filing preliminary documents on June 11, 1976, Deardorff realized that he did not know what to do next in order to advance the case. While there were a number of senior attorneys that Deardorff might have consulted, he felt embarrassed by his lack of knowledge and kept his problem to himself. If Deardorff had been aware that the competency rules require attorneys to know basic procedure, he might have had the incentive to avoid the course of action he then followed.

Deardorff soon realized that he had to tell his clients something. During 1979, he told them that the venue had been changed and that Judge Allen Rasor was to hear the case. Not only did this never happen, but Judge Rasor had died on July 30, 1978. Deardorff later told his clients that he had "fired" Judge Rasor and that the Indiana Supreme Court had appointed a new judge to the case. Deardorff, in late 1979, even traveled with his clients from Kokomo, Indiana to the Statehouse in Indianapolis, Indiana, supposedly to attend a scheduled hearing for the case. In reality, there was no hearing scheduled and, through a series of
deceptions, Deardorff convinced his clients that the hearing had been postponed indefinitely. Eventually, one of the clients learned of the deception by contacting the Supreme Court of Indiana herself.

By accepting employment in this matter and not seeking assistance... when he did not know how properly to proceed in this type of litigation, handled a legal matter which he knew he was not competent to handle without associating with him a lawyer competent to handle it in violation of Disciplinary Rule 6-101(A)(1) of the Code of Professional Responsibility for Attorneys at Law.

The court specifically held that youth and inexperience (in this case lack of knowledge), could not justify, or even mitigate, Deardorff's actions because, "[f]or three years Respondent had the opportunity to approach any lawyer with expertise in the field or to research the law and procedures relative to this type of litigation. Yet, he only took steps to escalate the falsehood which he had initiated." The court suspended Deardorff for a period not less than one year.

B. LACK OF ADVANCED KNOWLEDGE ABOUT THE LAW IS NOT A DEFENSE

Youth and inexperience do not shield a new attorney from competence violations. However, what if the circumstances under which an attorney takes a case suddenly change? A line of cases in New Jersey serves as a powerful warning to new attorneys that they should never assume that a case is going to be simple.

In In the Matter of Yetman, despite the fact that he had no experience working with estates, attorney Yetman took on the administration of an estate free of charge, because he felt it would be a simple case that he could dispose of easily. However, complications soon arose that Yetman could not handle. While he later admitted that he should have referred the file to another attorney, he instead "became afraid of the file" and began to ignore it and the client's requests for information concerning the case. As time passed, Yetman also ignored requests from the proper authorities concerning his handling of the case.

that his misconduct would not cost her anything. While the New Jersey Supreme Court reiterated its contention that disciplining an attorney is not done to punish the offender but for the "protection of the public against the attorney who cannot or will not measure up to the high standards of responsibility required of every member of the profession," it noted that an incident like this was not likely to happen again because Yetman was now working with an experienced attorney and concluded that some punishment was necessary. The court added a public reprimand to the private one Yetman had already received as a result of his actions.
The court also ordered that Yetman reimburse the ethics committee for its costs in the case. 130

In the Matter of Segal confirms the premise that a lawyer should never assume that a case will be easy.131 While this was more of a negligence case than a competence case, the lesson is the same. In February of 1989, a car owned by a New Jersey Superior Court judge and driven by his son was in a crash, killing the driver of the other vehicle. 132 The judge's car did not have functioning headlights and had not for several months.133 As a result, the judge was charged with allowing an unsafe vehicle to be operated in violation of New Jersey law. 134

Respondent Segal, the prosecutor in the case, "did not interview witnesses or arrange for their subpoenas prior to the designated trial date, nor did he take any steps to prepare for trial." 135 Segal later went to court the day the trial was to begin and asked for a continuance.136 The court denied the motion, and the case was dismissed because Segal subsequently failed to prove the elements of the crime. 137

then that the continuance should have been granted." 138 The New Jersey Supreme Court was not sympathetic. 139

[R]espondent's failure to engage in any trial preparation, in the context of his responsibility to prosecute a member of the judiciary for an offense related to the death of one victim and serious injury of another, elevates the severity of respondent's breach of duty to the level of an ethical violation.140

Because the court found no "improper motivation" or "affirmative interference with the criminal justice system" on the part of Segal, it only issued a public reprimand. 141 In spite of the somewhat lenient discipline, the court made it clear that it was attempting to send a message, particularly to members of the Bar serving the public. 142

IV. THE CHECKLIST

Thus far, this Note has outlined the Model Code and Model Rules approaches to attorney competence. It has also examined prominent competency cases. Upon concluding this examination of the law, the question becomes: What should a new attorney do to avoid competence problems? This Note will now outline some steps that a young attorney can take to avoid trouble with competence. The most important things that a new attorney can do to be prepared for ethical dilemmas concerning competence are to study the Model Rules, consult with a more experienced attorney whenever possible, be conscious of the impressions and advice of the
court, and be careful when assessing the fee to the client. Perhaps most importantly, when a new attorney realizes she has a competence problem, it is imperative that she tells the truth and seeks assistance immediately.

A. STUDY THE MODEL RULES

the primary sources of competence law and the forms of these rules that the attorney's particular state has adopted.

B. CONSULT

The Model Rules indicate that an inexperienced attorney should consult with a more knowledgeable attorney when it is warranted.146 This is a proposition seconded by competence case law. 147 Not only will this help a young attorney to avoid charges, but it will also help the new attorney in the process of learning legal practice and improving the quality of representation for the client.

However, as Chief Justice Bird so aptly pointed out in his concurrence in Lewis, this can be very difficult for new attorneys who enter solo practice.148 Young attorneys who work in firms have experienced lawyers working around them every day. In contrast, those who work in solo practice are not exposed to trained attorneys on a regular basis. Despite the difficulties associated with consultation, the rules and the case law both indicate that it is important for a new attorney to seek assistance wherever possible in handling her cases. 149

C. BE CONSCIOUS OF THE COURT'S ADVICE AND IMPRESSIONS

Competence is not just a post-case punishment issue. 150 In Center Foundation v. Chicago Insurance Company, the California Court of Appeals determined that, in spite of contrary precedent, a court in a criminal case had the right to remove a defense attorney for incompetence even over the objections of the client.151 Thus, for the sake of both the client and the case, the new attorney should carefully heed advice, warnings, or signs of concern from the trial judge. A judge, as a matter of human nature, may be more impressed by an attorney that seeks assistance than by one who attempts to stand alone in spite of a lack of knowledge or experience.

D. BE CAREFUL WHEN ASSESSING YOUR COSTS
handled a significant portion of a mortgage foreclosure proceeding after the lead attorney had a payment dispute with the client. The trial court reduced the amount per hour charged for the first year's work, and the appellate court affirmed.

The Supreme Court of Oklahoma remanded for a new determination after concluding that the reduced fee was still excessive. The court, citing State ex rel Burk v. Oklahoma City and Oliver's Sports Center v. National Standard Insurance, maintained that "time and labor required" and "the experience, reputation, and ability of the attorneys" were two major factors in determining the fairness of attorneys' fees. While the court conceded that an attorney who is new to an area of law still deserves to be compensated for "every minute of the lawyer's preparation," it held that,

The attorney's standing in the profession for learning, ability, skill, and integrity is recognized as a proper matter for consideration in assessing the value of the services provided and can be a basis for a higher award. The reverse is also true: inexperience, apparent lack of ability, or poor performance may reduce the award.

No rule requires that a new attorney be completely versed in the legal issues of a case immediately upon accepting it. However, new attorneys should be aware that they cannot pass all of their costs for learning the law on to their clients. This factors not only into the fees that a new attorney charges but into whether a case is worth taking at all.

E. IN TROUBLE? TELL THE TRUTH!

V CONCLUSION

While issues of attorney competence are seldom defined, the impact these issues have on the practice of law is significant. Chief Justice Bird realized the impact of attorney competence on legal practice years ago. Novice attorneys face particular difficulties both by the plain language of the Model Rules and in the way these rules have been applied in case law. Hopefully, by learning the lessons outlined in this Note, these attorneys can be better prepared to be legally competent practitioners.

CHRISTOPHER SABIS* & DANIEL WEBERT**

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