Clients hire lawyers for competent service precisely because they are not able to navigate a complex legal system themselves. Lawyers know that the nature of law and the legal system means that not every client can
be satisfied by the services the client receives or the result the lawyer achieves. Model Rules 1.1 and 1.3 codify the malpractice standard of care by requiring “reasonable” competence and diligence. This means you don’t have to be perfect, but you do have to meet or exceed the standard of practice in your jurisdiction. Reasonable competence and diligence can be established by expert testimony [§9.08] in a malpractice case [§8.06], and also can provide the basis for discipline [§8.02], although disciplinary agencies typically do not proceed against lawyers for isolated instances of incompetence or lack of diligence.

§4.02 CARE: SKILL AND KNOWLEDGE

Reasonable care usually depends upon evidence of professional custom or expert testimony [§ 9.08] about what a reasonably prudent lawyer in your jurisdiction would know and do in the same or similar circumstances. Specifically, lawyers must know relevant law and facts, must possess the requisite skill to be able to use this information throughout a representation, and must take the time to prepare diligently for the matter. If you do not know enough or have enough experience to handle a matter, you can become competent by studying or associating with another lawyer with more experience. If you wonder whether you know enough, but aren’t sure, you are well advised to find out. There is no such thing as an ignorant, inexperienced, or unaware lawyer defense to a claim of malpractice supported by expert testimony [§9.08].¹ Your license to practice holds out to clients and to courts that your agreement to handle a matter means you possess the skill and ability to do so. And don’t forget specialization. Just as a family practice physician who delivers babies is held to the standard of an expert Ob-Gyn, so also will you be held to the expert standard of care if you dabble in an area of practice that your jurisdiction deems specialized [§9.04].²

¹ In re Johnson, 32 P3d 1132 (Kan. 2001)(lawyer’s inexperience in the practice of law and lack of a mentor, which may have led to his failure to pursue discovery and to appropriately respond to a summary judgment motion, as well as to his filing a frivolous appeal to avoid malpractice created no defense to professional discipline for lack of competence and diligence).

² Battle v. Thornton, 646 A.2d 315 (D.C. 1994)(absent proof that the defendants held themselves out as specialists in Medicaid fraud defense, or that jurisdiction or profession recognizes such a specialty, lawyer is required to exercise skill and care of lawyers acting under similar circumstances); Horne v. Peckham, 158 Cal. Rptr. 714 (Cal. App. 1979)(lawyer who acknowledged the need for expertise in tax had duty to refer client to an expert practitioner or to comply with the specialty standard of care).
Red Flag If you aren’t sure what similarly situated lawyers know or do in providing a specific legal service, you are risking an after-the-fact judgment that you have not met the requisite standard of care. Remember that any lawyer in your jurisdiction can testify to what you should have done later if your client suffers harm.

§4.03 CARE: SCOPE OF THE REPRESENTATION

§4.03(a) The Short Representation?

Some guy contacted me through the firm’s web site. Wants to hire me for an hour. What should I do?

Model Rule 1.2(c) teaches us that lawyer and client should agree to the scope of the representation. But the admonition carries with it a warning. Just as a lawyer can get in trouble for stating the scope too broadly, a lawyer may not accept an unreasonable scope limitation that is too narrow. If the lawyer cannot provide helpful advice on that basis (no more than one hour) the lawyer should decline the representation.

On the other hand, there are times when it makes sense for a lawyer to provide partial or unbundled services so long as lawyer and client agree on the scope of the lawyer’s responsibility. If you want to accept a scope limitation because you think something helpful can come from spending an hour (say a review of a proposed divorce agreement or property transaction), then you should make the scope limitation clear in the engagement letter [§1.04] (which one hopes won’t take longer to draft than the engagement) so that there is no misunderstanding about the quality of the work you will be able to provide. While lawyers cannot ask clients to waive the lawyers’ malpractice liability [§6.16], work performed under a scope limitation should be judged with that fact in view.

§4.03(b) Reasonable Scope Limitations

Clients usually hire lawyers to handle specific cases or matters. Lawyers generally, but not always, prefer the client who wants that lawyer to handle all legal matters. Increasingly common is the client who seeks or the lawyer who offers the opposite: “Unbundled” legal services which limit the scope of the representation, by breaking down legal services into discrete tasks such as drafting, negotiation, or court
representation, or by providing service only for a particular legal issue, such as custody or property valuation.\footnote{Forrest S. Mosten, \textit{Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte} (ABA Law Practice Management Section 2000).}

Model Rule 1.2(c) and the Restatement both approve of these contractual bargains, but only if the limitation is reasonable and the client gives informed consent \cite{rlgl}.\footnote{Restatement of the Law Third, \textit{The Law Governing Lawyers}, §19 (ALI 2000). (Hereinafter “RLGL.”)} Here, the reasonableness standard is determined from the viewpoint of the client, not the professional, so consider whether the benefits of the limitation to your client (reduced fee, able lawyer) would outweigh the risks (inadequate or incomplete legal advice).

The bookends are clear: You cannot agree to limit your client’s right to settle a matter or plead guilty in a criminal case.\footnote{\textit{Jones v. Barnes}, 463 U.S. 745 (1983)(fundamental decisions to plead guilty, waive jury, testify or appeal are for defendant); \textit{In re Lansky}, 678 N.E.2d 1114 (Ind. 1997)(fee agreement provision which gave up client’s right to settle civil matter violated Rule 1.2(a)).} Nor can you agree to conduct a “preliminary” investigation that does not provide an opinion upon which the client can rely.\footnote{ABA Model Rule of Professional Conduct 1.2, Comment [7]. (2002). (Hereinafter “Model Rules.”)} Be especially aware of specialty areas of practice: A bankruptcy court has held that a lawyer representing a Chapter 7 debtor may not limit the scope of representation and must represent the debtor in all aspects of the bankruptcy case.\footnote{\textit{In re Egwim}, 291 B.R. 559 (Bankr. N.D. Ga. 2003).} And don’t forget lesson number one: Identify your client. If you provide insurance defense, duties to your primary client (the insured) \cite{rules} mean that the insurer may not interfere with your obligation to the insured, for example, by requiring prior approval of depositions, research, and motions \cite{6.32}.\footnote{In re \textit{Rules of Professional Conduct}, 2 P.3d 806 (Mont. 2000)(insurance defense counsel may not abide by agreements to limit the scope of representation that interfere with their duty to insured client).}

On the other hand, agreeing to offer short-term legal services via a legal services hotline \cite{1.14}, to handle a trial but not an appeal, to