Competence: Why You Were Hired In The First Place

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§5.01 COMPETENCE: CARE AND DILIGENCE

§5.01(a) The Non Non-Compete?

I was in a hurry and forgot to insert the standard non-compete clause in the employment contract I drafted for employer. I don’t think my client even mentioned it though, so I’m safe, right?

Depends on what you mean by “safe.” Your client paid you not only to obey her instructions, but also to offer her relevant legal options. If non-compete clauses are “standard” in these kind of employment contracts in your jurisdiction, you are just one expert witness away from a legal conclusion that you did not exercise the requisite skill, diligence and preparation necessary for the representation. This violates Model Rule 1.1, although you are unlikely to be subject to professional discipline for just one slip. It also constitutes a breach in the standard of care, although your client would have to show that the breach...
caused harm. Let’s hope the employee never sets up business across the street.¹

►§5.01(b) The Competence Obligation

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 mimic 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 [§11.08] in a malpractice case [§9.07], and also can provide the basis for discipline [§9.03], although disciplinary agencies typically do not proceed against lawyers for isolated instances of incompetence or lack of diligence.

►§5.02 CARE: SKILL AND KNOWLEDGE

►§5.02(a) It Can’t be That Hard?

Just learned at a new business meeting that a long-time client asked us to file a patent application. No one here has ever done one, but how hard can it be? The client can teach us the technology.

For starters, there’s that nasty problem of admission to the patent bar. But even if you could somehow help your client file the application pro se, what value are you adding (and charging for)? While it’s true that your license presumes you can practice any kind of law, competence requires that you identify areas in which you are not competent (and tell your client about that). Sure, it is generally the case that you can achieve the requisite level of competence by adequate study and preparation, or by associating with experienced counsel. But your firm has no plan to accomplish the former and no plans to bring on co-counsel either. We suggest that, if you must keep the client, find a competent patent practitioner and, with your client’s permission, let that lawyer supply you with the missing expertise.²

►§5.02(b) The Standard of Care

Reasonable care usually depends upon evidence of professional custom, or expert testimony [§11.08] that defines 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

¹ E.g., Russo v. Griffin, 510 A.2d 436 (Vt. 1986) (lawyer who failed to offer non-compete option to employer client subject to malpractice liability).
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 [§11.08]. 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.

Red Flag If you aren’t sure what similarly situated lawyers need to know 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 if your client suffers harm as a result of deficiencies in your services.

§5.03 DILIGENCE

§5.03(a) Not to Worry?

I’m a new associate. About a month into the job, I explained to my boss that I knew nothing about employment discrimination and was so busy I didn’t have time to learn enough to draft a complaint for a new client. My boss told me not to worry, just tell our paralegal to dig out a formbook and draft the complaint. I gave her the discrimination case and she drafted the complaint a few months later. You guessed it: we didn’t file the required 90-day notice with the administrative agency, so the court dismissed our complaint with prejudice.

We sympathize. Your boss should have given you better guidance. But if you didn’t know about the required notice provisions, you should have asked someone who could help. Both you and your boss are responsible to the client, who may file a grievance. You have no defense of reasonable reliance on your boss, because Model Rule 5.2 only allows that excuse to “subordinate lawyers” where there was no arguable question of professional duty. We think your boss, not you, deserves the discipline, for failure to supervise. As to malpractice,

3 In re Johnson, 33 P.3d 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).

4 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. Rep. 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).

5 Daniels v. Alander, 844 A.2d 182 (Conn. 2004) (associate who failed to correct supervisory lawyer’s false statement to a court made when associate was present reprimanded); People v. Casey, 948 P.2d 1014 (Colo. 1997) (lawyer who assisted client in crime of criminal impersonation by not correcting court record of client’s name not relieved of responsibility because he consulted with senior partner).

6 In re Cohen, 847 A.2d 1162 (D.C. 2004) (partner who had “no system in place to impart rudimentary ethics training to lawyers in the firm” suspended for thirty days because given the discreet nature of the case,
you are both on the hook.

►§5.03 (b) Reasonable Diligence and Promptness

Model Rule 1.3 requires that lawyers act with reasonable diligence and promptness. Diligence requires commitment and dedication to the client’s interests, something called zealous representation in the ABA’s earlier Model Code of Professional Responsibility. Promptness should speak for itself: You must manage the workload imposed by the rest of your practice so that you can give reasonable and timely attention to each client matter. If you have supervisory authority in a law firm, you have the same obligation to watch the workload of those you supervise. Simple procrastination in a matter may or may not be serious, depending on the time deadlines imposed and the exigencies of the situation. But anytime “being behind” causes harm to your client, you may face malpractice or disciplinary consequences. If you are a lawyer with managerial authority in a law firm, you are responsible for establishing policies and procedures that prod all lawyers in the firm to comply with this obligation.7

► Red Flag► The client or client matter you most dislike is the very one you are most likely to ignore. If you find yourself avoiding a matter, ask why. Do you lack the ability to handle it? Do you dislike the client? When you understand the problem, you can respond now and avoid trouble later, either by setting aside the time to tackle the matter, or by having a heart to heart with your client and perhaps suggesting replacement counsel. If you seek to withdraw, remember that you cannot prejudice your client’s interests by doing so, and you must obtain the permission of the relevant tribunal if the matter is before a court [§8.02].

►§5.04 OBVIOUS ERRORS AND COMMON KNOWLEDGE

In malpractice cases, some errors are so obvious that they trigger the “common knowledge” exception to the expert testimony [§11.08] requirement, which deems some breaches of duty clear enough that a lay juror can recognize them without the aid of an expert witness.8 In the same way that physicians can be found liable for leaving surgical instruments in a person’s body or operating on the wrong wrist, lawyers can be found liable without expert testimony for three obvious errors:
1. Failing to file within a mandatory time period;
2. Failing to do legal or factual research; and
3. Failing to observe core fiduciary duties such as control or obedience [Chapter 3], communication [Chapter 4], or confidentiality [Chapter 6].

Even though these are obvious, insurers know they are far too common.

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7 MODEL RULE 5.1, RLGL § 11.
8 RLGL §§16, 49.