

**RULE 1.1:
COMPETENCE**

Executive Summary

Proposed Rule 1.1 concerns the duty of a lawyer to provide competent representation. The rule defines competence and provides for discipline for intentional, reckless or repeated acts of incompetence. The rule also continues several current disciplinary provisions: DR 6-101(A)(1) and (2), which prohibit a lawyer from undertaking a legal matter when incompetent to do so or handling a legal matter without adequate preparation; and DR 7-101(A)(1), which prohibits a lawyer from failing to pursue the client's objectives through reasonably available means; and DR 7-101(A)(3), which, subject to limited exceptions, prohibits a lawyer from prejudicing or damaging the client during the course of the representation.

Text of Proposed Rule and COSAC Explanation

RULE 1.1: COMPETENCE	COSAC COMMENTARY
<p>(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.</p>	<p>¶ (a) is identical to the entirety of ABA Rule 1.1, except that the word "shall" is changed to "should."</p>
<p>(b) A lawyer shall not intentionally, recklessly or repeatedly:</p> <p style="padding-left: 40px;">(i) fail to provide competent representation to a client;</p> <p style="padding-left: 40px;">(ii) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or</p> <p style="padding-left: 40px;">(iii) prejudice or damage the client during the course of the representation except as permitted or required by Rules 1.6, 1.16, 3.3 and 4.1.</p>	<p>¶ (b)(i) is similar to California Rule 3-110 and incorporates the substance of DR 6-101(A)(2), which prohibits a lawyer from "hand[ling] a matter without preparation adequate in the circumstances." Clause (ii) of ¶ (b) is substantively the same as DR 7-101(A)(1) but with minor changes of wording. Clause (iii) of ¶ (b) is substantively similar to DR 7-101(A)(3), but provides specific references to the four rules that permit or require a lawyer to act in a way that prejudices or damages a client.</p> <p>The proviso of DR 6-101(A)(1), that competent representation may be provided through the association of a lawyer of established competence, is not included in the text of the Rule but is found in Comment [2].</p>

<p>Comment</p> <p>Legal Knowledge and Skill</p> <p>[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. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.</p> <p>[1A] A lawyer who intentionally, recklessly or repeatedly fails to provide competent representation to a client is subject to discipline. In general, however, a lawyer is not subject to discipline for a single instance of ordinary negligence by itself. "Recklessly," as used in paragraph (b), encompasses gross negligence.</p> <p>[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</p>	<p>COSAC COMMENTARY</p> <p>Comment [1] is identical to its ABA counterpart except for the addition of a new final sentence drawn from the District of Columbia Rules of Professional Conduct. The sentence warns lawyers that, if they hold themselves out as having special experience, they will be subject to the standard of care commensurate with that of those lawyers rather than that of a general practitioner.</p> <p>Comment [1A], not contained in ABA Model Rule 1.1, reflects the content of Proposed Rule 1.1(b)(i) and is consistent with the current law and practice of lawyer discipline in New York.</p> <p>Comments [2] and [3] are identical to those of ABA Rule 1.1.</p>
--	--

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 and 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 may limit the scope of the representation if it complies with Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. See 22 N.Y.C.R.R. Part 1500 and the accompanying Rules and Regulations.

Comment [4] is identical to ABA Comment [4].

Comment [5] is identical to its ABA counterpart except that the final sentence has been shortened.

Comment [6] is identical to ABA Comment [6] except that a reference to the New York judicial rule regulating continuing legal education has been added.

--	--

Changes from Existing New York Code

Proposed Rule 1.1 combines the ABA definition of competence, “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” in paragraph (a) with a rule stating current New York disciplinary law governing instances of severe or repeated failure to provide competent representation in paragraph (b)(i).

The Proposed Rule follows ABA Model Rule 1.1 in stating the ideal that a lawyer provide “competent representation” at all times. However, this is stated in precatory form (“should” rather than “shall”) and states the disciplinary standard in a negative form which prohibits intentional, reckless or repeated failure to provide competent representation to a client, following the New York Code. The lawyer’s conduct must be carried on either “intentionally,” “recklessly” or “repeatedly.” A volitional element is involved in reckless or repeated actions. At a minimum, gross negligence is required.

DR 6-101(A)(3), prohibiting neglect of a matter, is deleted under the Proposed Rule, as Proposed Rule 1.3 deals with neglect.

DR 6-101(A)(1), permitting an incompetent lawyer to handle a particular matter if a competent lawyer is associated with the representation, is omitted from the text of the Proposed Rule. However, the last sentence of Comment [2], dealing with training or prior experience, states the same principle.

Reporter’s Notes

ABA Model Rule 1.1 expresses an affirmative moral obligation of competent representation. Its content and placement were designed in part as a statement both to lawyers and to the public of one of the most fundamental obligations of a professional: to provide reasonably competent professional services to a client. Precisely because Rule 1.1 states an affirmative ideal, it cannot be literally transformed into a disciplinary requirement. In all U.S. jurisdictions, including New York, lawyers are disciplined only for intentional, reckless or repeated instances of incompetent representation of a client or of several clients. A minority of jurisdictions, apparently concerned that the affirmative obligation stated in ABA Rule 1.1 would be taken seriously as a disciplinary offense, have substituted or added language that states the disciplinary reality.

The Proposed Rule combines the ABA statement that a lawyer should represent clients in a competent fashion and the Rule’s definition of competence with a disciplinary rule that states the operative law in New York and other jurisdictions: a lawyer’s intentional, reckless or repeated incompetence in handling a single matter or a series of matters is a disciplinary offense.¹

¹ See, e.g., *Matter of Sorid*, 189 A.D.2d 377 (2d Dep’t 1993) (lawyer violated DR 6-101 by (1) failing to retrieve the file in an estate matter after a former employee removed it from the attorney’s offices and (2) failing to probate an estate within four years); *In re Lowenthal*, (continued)

The Proposed Rule prohibits incompetent representation that is intentional, reckless or repeated and seeks to reflect New York's current disciplinary law and practice.

Corresponding New York Disciplinary Rules

DR 6-101(A) (1) -(3)

A. A lawyer shall not:

1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.
2. Handle a legal matter without preparation adequate in the circumstances.
3. Neglect a legal matter entrusted to the lawyer.

DR 7-101 Representing a Client Zealously.

A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

2. Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

3. Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102(B) or as authorized by DR 2-110.

132 A.D.2d 117 (2d Dep't 1987), *appeal dismissed*, 71 N.Y.2d 888 (1988) (lawyer violated DR 6-101(A)(3) by neglecting an estate matter for more than seven years). *Cf. Brotman v. Dickstein, Shapiro & Morin*, Index No. 117570/97 (Sup. Ct. N.Y. Co. July 2, 1998): law firm, after agreeing to represent plaintiff in a suit against the City of New York, abandoned the case and allowed a dismissal to be entered against the plaintiff, with costs, without informing her of these actions; held, the law firm "committed malpractice and acted reprehensibly . . . fail[ing] to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community." Nevertheless, the malpractice action was dismissed on causation-of-damages grounds (the case against the City would not have prevailed); and causes of action for grossly negligent and reckless conduct were not adequately pleaded.