



INEXPERIENCED & SOLO

By KEN JORGENSEN

A member of the State Bar shall not willfully or habitually perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services ... unless he associates or ... professionally consults with another lawyer who ... possess[es] the requisite learning and skill.

Rule 6-101(A)(1), Calif. Rules of Prof. Conduct (1975).

In 1972 Rider Lewis was admitted to the California bar and immediately began solo practice. Seventeen months later, a prison inmate retained Lewis to probate the inmate's deceased wife's estate, even though Lewis had no probate experience or training. Initially, Lewis enlisted the assistance of an experienced probate lawyer to get Lewis appointed as administrator of the estate. Unfortunately, Lewis did not seek further assistance and, having failed to perform fundamental probate administration tasks such as preparing an inventory and filing federal and state income, estate and inheritance tax returns, he found himself in the midst of lawyer discipline proceedings.

The California Supreme Court concluded that Lewis's ethical violations were the direct or indirect result of his "complete lack of familiarity with probate law." Although the Court concluded Lewis violated the California ethics rule requiring competence, it stayed his 30-day suspension and placed him on probation for a year. A concurring opinion by the chief justice notes the paradox created by the California competency rule for the new lawyer who chooses solo practice:

The burden of this [ethics rule requiring competency] unfortunately appears to fall disproportionately on younger members of the legal profession who begin their careers as solo practitioners. It is they who are most likely to lack 'the learning and skill ordinarily possessed by lawyers ... who perform ... similar services ...,' yet be unable to easily 'associate' or 'professionally consult'

another lawyer possessing the requisite learning and skill. It has been suggested that [the competency ethics rule] may implicitly mandate an apprenticeship system for beginning lawyers (citations omitted).

* * *

Law schools have traditionally emphasized training in legal reasoning as opposed to legal practice: 'how to think' rather than 'how to do.' While this may be a necessary predicate to the practice of law, it places increasingly severe burdens on law school graduates who are unable to secure employment with large law firms or government agencies where they have access to advice from experienced colleagues.¹

Current ethics rules tend to be less demanding in their treatment of new lawyer competency. For example, the comment to Minnesota's competency rule expressly states that special training or prior experience is not required and that a lawyer can undertake a legal matter in a "wholly novel" field of law through "necessary study" or by associating with experienced counsel.² However, to the extent the California rule was unduly onerous, current ethics rules likely understate new lawyer competency requirements. Courts continue to demand a level of basic legal knowledge regardless of the lawyer's experience and impose discipline or other consequences when that knowledge is lacking.³ Examples include a lawyer's lack of understanding of the difference between a secured and unsecured creditor in a bankruptcy representation, erroneously believing that the medical malpractice statute of limitations would not run until after the lawyer had obtained an opinion from the client's treating physician, failing to research how to perfect a security interest in a liquor license, failing to enforce a judgment or require the posting of a supersedeas bond during the pendency of a divorce appeal, and repeatedly making improper objections during a federal trial.⁴

More often than not, competency

problems (as well as ethical issues) for new lawyers stem from their inability to identify or see the legal issue, rather than improper or incompetent legal analysis. Lawyers typically acquire this skill through experience, which includes observing other lawyers. New solo lawyers have limited opportunities to observe other lawyers. Consequently, the key to honing one's competency and ethics recognition skills is to maximize the opportunities to learn from other lawyers, in order to gain greater awareness of the situations in which competency and ethics problems commonly arise.

■ **KNOW YOUR LIMITS.** Some cases simply demand greater competence or experience than a new lawyer practicing alone can reasonably provide. Even where extensive research and self-education efforts will enable the new lawyer to attain the necessary competency, the question remains whether 100 percent of the time is properly billable to a client.⁵ Other cases may require financial or other resources beyond what a new lawyer can provide. For example, a newly admitted Minnesota lawyer was suspended after she accepted a medical malpractice case and advised her client to sign a \$7,000 loan agreement to pay medical expert fees because the lawyer was financially unable to advance the expert costs. The loan agreement obligated the client to repay over \$20,000 from the malpractice settlement or recovery.⁶ New lawyers facing these limitations should consider associating with experienced counsel. Another option is a fee-sharing referral arrangement with an experienced lawyer. Ethics

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cause of lawyers' self-regulation in Minnesota for over 20 years.

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rules now permit division of fees, including contingent fees, without regard to the services performed by each lawyer if both lawyers assume joint responsibility for the case. See Rule 1.5(e)(1).

■ **DON'T TAKE EVERY CASE.** Resist the financial temptation to take just any case. Be selective, both in terms of what you substantively can handle as a new lawyer and also the type of client. The post 9/11 changes to immigration law and procedures have generated significant demand for immigration counsel. As a result, disciplinary agencies across the nation have experienced a spike in ethics complaints about the incompetence of lawyers handling immigration cases. In Minnesota, a disproportionate number of these complaints involve new or relatively new solo practitioners.

Immigration law procedures are regimented and swift. The consequences of procedural miscues can result in Draconian client consequences. Lawyers unfamiliar with immigration procedures should not dabble in this area of law. New lawyers desirous of entering immigration practice would do well to associate with experienced counsel and gain membership in the American Immigration Lawyers Association (AILA). See www.aila.org.

Where multiple attorneys have already represented the client, it is prudent to obtain client authorization to talk to the previous lawyers before accepting representation. Client unwillingness to provide such a waiver deserves further scrutiny and consideration.

Be cautious of creating unrealistic client expectations or overselling your representation. Clients with unrealistic expectations are less rational when considering settlement offers, lodge more objections about fees, and are more likely to file ethics complaints. Competent representation includes being frank when the merit of the client's claim or the chances of success are marginal. A successful small firm lawyer once commented, "Two of my best clients are persons whom I advised in the very first representation that it was not worth it to pursue their claims."

■ **MAINTAIN YOUR LICENSING OBLIGATIONS.** Minnesota attorney license fees must be paid annually. Mandatory continuing legal education (CLE) reports are filed every three years. These dates should be included in your office calendar or tickling system. Continuing to practice after failure to pay the fee or comply with CLE requirements constitutes the unautho-

rized practice of law and can lead to formal disciplinary action.

Personal obligations can also have law license consequences. Countless lawyers have been suspended over the years for failure to file income or employee withholding tax returns. Within the last decade, the obligation to pay child support or maintenance has become a basis for license revocation for all professions, including lawyers.⁷

■ **LEARN HOW TO HANDLE CLIENT FUNDS.** Solo lawyers can hardly conduct business without a trust account. Learn the trust account record-keeping requirements. Educational materials, including sample trust account records and a manual on electronic maintenance of trust account records are available on the Lawyers Board Web site, www.courts.state.mn.us/lprb. Familiarize yourself with what goes into the trust account and what does not. Do not leave earned fees in the trust account for extended periods unless the fees are in dispute. Do not disburse client funds until the corresponding deposit has been made. Refrain from disbursing your earned fees from the trust account directly to personal or law office creditors; transfer earned fees to your office account before making such disbursements.

■ **BE FORTHRIGHT ABOUT MISTAKES.** Despite best efforts, lawyers still make mistakes and commit ethical violations. Rarely are the consequences as drastic or dire as most lawyers imagine. At the same time, the fallout is always far greater when the lawyer compounds the mistake or violation with dishonesty. Forthright explanations and cooperation can mitigate the severity of disciplinary sanctions, whereas lack of candor and cooperation always increase the penalties.

■ **AVOID ISOLATION.** Good solo practitioners may practice law alone, but they do not isolate themselves from other lawyers. Peer pressure and the acknowledgment of other lawyers or professionals is a critical component of professional development. Even criticism from those we respect can play a large role in developing a positive professional perspective. Recently, St. Thomas Law School and the Center for Ethical Business Cultures sponsored a seminar that included interviews with two recently disbarred lawyers, one who was already incarcerated and the other awaiting sentencing. Both were solo practitioners and each offered different motivations or rationalizations for their criminal behavior. Both acknowledged, however, that their isolation from other lawyers contributed to

their downfall. Isolation prevented one from seeking financial assistance that was readily available from others. The other postulated that isolation from his professional peers prevented him from being grounded in the economic realities of law practice and permitted him to maintain the façade of a successful lawyer when in fact he was a thief.

Minnesota lawyers have access to a wealth of resources to combat problems associated with practice isolation, including several available through the Minnesota State Bar Association (MSBA). Recently, the MSBA formed the *Solo Pilot* group for solo practice lawyers admitted in 2004. Monthly meetings include presentations by experienced lawyers on issues unique to new solo practitioners. Other MSBA offerings include:

- *New Lawyers Section* — offers professional development opportunities through networking and socializing with other lawyers.
- *General Practice, Solo and Small Firm Section* — provides solos with access to programs and publications specifically designed to improve their practice.
- *Various Practice Sections* — devoted to specific substantive areas of law practice that promote educational seminars and materials to assist lawyers in maintaining competency. Many sections have email list services that are extremely helpful in keeping abreast of recent developments in the law. See also offerings of the Hennepin County and Ramsey County bar associations at www.hcba.org and www.rcba.org.
- *Colleague Program* — a lawyer-to-lawyer information service. It provides the opportunity for an attorney member unfamiliar with a legal area to talk to an attorney who is more experienced and knowledgeable.
- *practicelaw.org* — a Web site for MSBA members that delivers practice tools including forms and templates for legal documents, sample pleadings, discovery checklists, and practice tips from experienced practitioners.

Beyond assistance with substantive law and procedure, the *Minnesota Lawyers Assistance Program* offers free, confidential help to lawyers affected by chemical abuse, depression, stress and other life-related problems. See www.mnlcl.org. The MSBA's

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Life and the Law Committee works closely with the Lawyers Assistance Program to stimulate discussion and provide resources to the legal community regarding career satisfaction, mental and chemical health, balance, and other quality of life issues.

Ethical resources and assistance are also available through the Lawyers Professional Responsibility Board and Office of Lawyers Professional Responsibility (OLPR). The Lawyers Board Web site, www.courts.state.mn.us/lprb, contains rules, opinions, articles, and other materials about Minnesota legal ethics. Telephone advisory opinions about ethical issues can be obtained by calling the OLPR (651) 296-3952.

As a solo practitioner you may practice law by yourself, but the availability of these resources demonstrates that you need not be isolated and are never alone. □

NOTES

1. *Lewis v. State Bar of California*, 621 P.2d 258, 261-62 (Cal. 1981) *Bird, C. J. concurring*.
2. *Comment to Rule 1.1, Minnesota Rules of Professional Conduct*.
3. See *Sabis & Webert*, "Understanding the 'Knowledge' Requirement of Attorney Competence: A Roadmap for Novice Attorneys," 15 *Geo. J. Leg. Ethics* 915 (2002), and the cases cited therein including those in footnote 4, below.
4. *In re Farmer*, 950 P.2d 713 (Kan. 1997) (bankruptcy representation); *In re Moore*, 494 S.E.2d 804 (S.C. 1997) (medical malpractice statute of limitations); *Baird v. Pace*, 752 P.2d 507 (Ariz. Ct. App. 1987) (perfecting security interest; legal malpractice case); *In re Gallegos*, 723 P.2d 967 (N.M. 1986) (failure to enforce judgment, require bond during pendency of divorce appeal); *In re Dempsey*, 632 F.Supp. 908 (N.D. Cal. 1986) (improper objections during federal trial).
5. See e.g. *In re Fordham*, 668 N.E.2d 816 (Mass. 1996) (although lawyer's records documented hours expended, fee was still excessive because other lawyers would have handled case for substantially less). See also *Robert L. Wheeler, Inc. v. Scott*, 777 P.2d 394 (Okla. 1989).
6. *In re Rhodes*, 676 N.W.2d 267 (Minn. 2004).
7. Minn. Stat. §518.551, subd. (12), authorizes the license suspension of professions other than lawyers. Rule 30, *Rules on Lawyers Professional Responsibility*, provides a similar administrative procedure for suspending lawyers whose nonpayment of support meets the statutory threshold.

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on 50 years of practice.

It has been a privilege to practice together.



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