INEXPERIENCED & SOLO

by Ken Jorgensen

A member of the State Bar shall not
unjustifiably or unreasonably perform legal services for another lawyer possessing the requisite learning and skill. Alternatively, a lawyer should not agree to perform legal services for another lawyer possessing the requisite learning and skill.


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, found himself in the midst of a lawyer discipline proceeding.

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 stays 30-day suspension and 18-month probation for a year. A concerning opinion by the chief justice notes the paradox created by the California competence rule for the new lawyer who chooses solo practice.

The burdens of this [ethics rule requiring competence] unfortunately appears to fall disproportionately on younger members of the legal profession who begin their careers as solo practitioners. It is who they are not likely to lack the learning and skill ordinarily possessed by lawyers who perform similar services . . . . yet unable to easily 'associate' or 'professionally consult' another lawyer possessing the requisite learning and skill. It has been suggested that [the competence rule] implicitly mandates an apprenticeship system for beginning lawyers (citations omitted).

Law school has traditionally emphasized teaching is legal reasoning as opposed to legal practice: 'how to think' rather than 'how to do.' While this may be a necessary prerequisite 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.

Current ethics rules tend to be less demanding in their treatment of new lawyer competence. For example, the Minnesota Supreme Court expressly states that special waiting or prior experience is not required if a lawyer can demonstrate a legal matter in a "thoroughly" field of law through "necessary study" or by associating with experienced counsel. However, to the extent the California rule was merely onerous, current ethics rules generally undertake new lawyer competence 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. Examples include a lawyer's lack of understanding of the difference between a secured and unsecured creditor in a bankruptcy representation, erroneously believing the malpractice statute of limitations would not run until after the lawyer had obtained an opinion from the client's periodical 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 apparently seeking improper objections during a federal trial.

Often more 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 imprudent or incompetent legal analysis. Lawyers typically acquire that 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 competence and ethics recognizes skills is to maximize the opportunities to learn from other lawyers, in order to gain greater awareness of the situations in which competence and ethics requires competence.

Unknown limits. Some cases simply demand greater competence or experience than new lawyer practicing alone can reasonably provide. Even where extensive research and self-education efforts enable the new lawyer to retain the necessary competence, the question remains whether 100 percent of the time is properly billable to a client. 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 $1,000 loan agreement to pay medical expert fees because the lawyer was financially unable to advance the expert costs. The loan agreement obliged the client to repay over $20,000 from the malpractice settlement or recovery. New lawyers facing these limitations should consider associating with experienced counsel. Another option is fee-sharers referral arrangement with an experienced lawyer. Ethics continued on page 14

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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(c)(11).

**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 past 20 years changes to immigration law and procedures have generated significant demand for immigration counsel. As a result, discipline agencies across the nation have experienced a spike in ethics complaints about the inexperience of lawyers handling immigration cases. In Minnesota, a disproportionate number of these complaints involve new or relatively new solo practitioners.

Immigration law procedures are regulated and sure. The consequences of procedural mistakes can result in Duncan class 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.

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 as waiver deserves further scrutiny and may foreshadow future problems. Be cautious of creating unrealistic client expectations or overreaching your representation. Clients with unrealistic expectations are less rational when a compromising settlement offer, 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 claims or the chances of success are slim. A competent attorney and client cooperatively consult and discuss the case. As a new practitioner, I have noticed that new attorneys do not prepare as thoroughly as more experienced attorneys. This can result in an attorney-client relationship. Be forewarned about mistakes. Despite best efforts, lawyers still make mistakes and commit ethical violations. Fortunately, the consequences are drastic or critical as most lawyers anticipate. At the same time, the fallout is always greater when the parties cooperate to resolve disputes. The definition of cooperation differs. Forthright explorations and coordination can mitigate the severity of disciplinary actions, whereas lack of comfort and cooperation always increase the penalties.

**Avoid Isolation.** Good solo practices 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 Professional Excellence sponsored a seminar that included interviews with two recently debarked lawyers, one who was already incarcerated and the other sentenced. Both were solo practitioners and each offered different viewpoints on the nature and inquisitiveness of their criminal behavior. Both acknowledged, however, that their isolation from other lawyers contributed to their downfall. Lack of a mentor is one reason seeking financial assistance that was readily available from others. The other isolation that isolation from other professionals. The problem prevented him from being grounded in the economic realities of law practice and permitted him to maintain the facade of a successful lawyer even in fact was he a thief. Minnesotans 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 Practitioner 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 solo with access to programs and publications specifically designed to improve their practice.
- Various Practice Sections — directed to specific substantive areas of law practice that promote educational seminars and materials to assist lawyers in maintaining competence. Many sections have email list services that are extremely helpful in keeping up to date with changes to the law. See also offerings of the Haywood County; and Ramsey County for associations at www.armc.org and www.mnsb.org.

**E-Business and the Law** — a lawyer's law 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. E-Business and the Law service for MSBA members that delivers practical tools including forms and template for legal documents, simple pleadings, discovery checklists, and practical 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.mladp.org. The MSBA's
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