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]. 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].

1 In re Johnson, 32 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).

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.³

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 [§3.05(d)].⁴ 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.⁵ Nor can you agree to conduct a “preliminary” investigation that does not provide an opinion upon which the client can rely.⁶ 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.⁷ And don’t forget lesson number one: Identify your client. If you provide insurance defense, duties to your primary client (the insured) [§1.17] mean that the insurer may not interfere with your obligation to the insured, for example, by requiring prior approval of depositions, research, and motions [§6.32].⁸

On the other hand, agreeing to offer short-term legal services via a legal services hotline [1.14],⁹ to handle a trial but not an appeal,¹⁰ to

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⁵ Jones v. Barnes, 463 U.S. 745 (1983) (fundamental decisions to plead guilty, waive jury, testify or appeal are for defendant); 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)).
⁶ ABA Model Rule of Professional Conduct 1.2, Comment [7]. (2002). (Hereinafter "Model Rules").
⁸ In re 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).
⁹ See §1.04(i); Model Rule 6.4.
advise about one transaction or claim but not others,\textsuperscript{11} or to provide a quick legal opinion about a proposed mediated settlement without additional factual investigation\textsuperscript{12} all are reasonable as long as your client gives informed consent [§3.05(d)]. Informed consent requires that the client understands the alternatives, especially those that other lawyers might include in the same representation. So, for example, a lawyer may be reasonable in limiting a representation to worker’s compensation alone, but only if the client understands that other lawyers might be retained who would be free to identify and pursue additional tort actions against third parties.\textsuperscript{13}

\textbf{Red Flag} The more complex the legal matter, the greater the need for explicit informed consent from your client to limit your representation. A good engagement letter [§1.04] provides you with an opportunity to clarify which legal services you do and do not intend to provide. Be sure to specify alternatives that you will not pursue to make it clear that a client should seek those services elsewhere.

\textbf{§4.04 OBEDIENCE}

\textbf{§4.04(a) Whose Tactics?}

I’ve always been a mensch. You need an extension; unless my client’s cherry tree is going to be chopped down, I grant it. I do it for two reasons. I’m a nice guy. And I figure someday I will need more time. But this new client wants Rambo. I’ve been instructed by the client to grant no extensions. Ever. What can I do?

Model Rule 1.2(a) says that clients define the objectives of the representation, but lawyers determine the means in consultation with the client. You can tell the client there is a limit to the extent to which the client will define how you conduct the matter, and that if the client wants a lawyer who will conduct himself that way, the client is free to switch lawyers. If the client does not relent and refuses to accept your invitation to look elsewhere, you would then be free to withdraw on the ground that the client wishes you to pursue a course...

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of conduct that you consider repugnant or with which you have a fundamental disagreement.  

➤§4.04(b) Objectives And Means

Lawyer-agents are empowered by clients and obligated by fiduciary duty to obey a client-principal’s lawful instructions regarding the objectives of the representation.  

Lawyer-agents are empowered by clients and obligated by fiduciary duty to obey a client-principal’s lawful instructions regarding the objectives of the representation.  

Because clients may not know or understand the range of available legal alternatives, lawyers have an affirmative obligation to explain legal options sufficiently so that clients are able to make informed choices about their objectives. In addition to the client’s right to determine the purposes of the representation, both Model Rule 1.2(a) and the Restatement identify several specific client decisions that may not be irrevocably delegated to a lawyer, including the right to decide whether to settle a civil matter and, in criminal cases, how to plead, whether to waive a jury trial, and whether the client will testify.  

Once the client has decided on an objective, the lawyer must act to implement it.  

Lawyers are impliedly authorized [§5.07] to take such action but also must consult with the client as to the means by which the objective is to be accomplished.  

Clients and lawyers are free to bargain about any lawful means that will be used to pursue the client’s objectives. If you do not want to engage in the scorched-earth tactics your client insists upon, you may withdraw from the representation, just as the client may discharge you if the client is unhappy with your approach to the matter [§2.11].

➤Red Flag➤ Your ability to bargain with your client about the objectives and means of the representation ends when either your client or you are about to embark on illegal or fraudulent activity. If

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14 Model Rule 1.16(b)(4).
15 Model Rule 1.2(a); RLGL §16(1).
16 RLGL §22.
17 Vandermay v. Clayton, 984 P.2d 272 (Or. 1999)(lawyer liable for breach of fiduciary duty without expert testimony for drafting ambiguous indemnity agreement that did not include the protections client insisted upon); Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980)(lawyer liable without expert testimony for failure to effectuate client’s instruction to secure a first mortgage in sale of her home).
18 Model Rule 1.4(a)(2).
19 Model Rules 1.2, Comment [2], 1.16(b)(4).
your client insists on criminal or fraudulent action, you must withdraw [§§7.02, 7.04 and 7.05].

§4.05 DILIGENCE

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.

Red Flag The client or client matter you most dislike or least understand 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 [§7.02].

§4.06 OBVIOUS ERRORS AND COMMON KNOWLEDGE

In malpractice cases [§8.06], some errors are so obvious that they trigger the “common knowledge” exception to the expert testimony [§9.08] requirement, which deems some breaches of duty clear enough that a lay juror can recognize them without the aid of an expert witness. 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:

- Failing to file within a mandatory time period;

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20 RLGL §§16, 49.
• Failing to do legal or factual research; and
• Failing to observe core fiduciary duties such as communication [Chapter 3], obedience [§4.04], or confidentiality [Chapter 5].

§4.06(a) Timely Filings

If you miss a time period and cannot secure an extension, you always face a potential malpractice claim [§8.06], though disciplinary agencies will seldom impose sanctions unless you exhibit a pattern of such behavior. Model Rule 1.3 provides that lawyers must act with reasonable diligence and promptness in representing clients. In malpractice cases, diligence and promptness roughly correlate with the “common knowledge” exception to the expert testimony requirement [§9.08], because deadlines are obvious and lawyers should know and comply with them on behalf of clients. Juries don’t need an expert to know that promptness requires you to file a case or appeal on a timely basis, which translates into your need for an appropriate tickler system to remind you about dates.

§4.06(b) Legal And Factual Research

Similarly, the failure to do any legal research or investigate relevant facts constitutes a breach of your diligence obligation [§4.05] to make sure both have been completed. In criminal cases, these failures can amount to constitutionally deficient ineffective assistance of counsel [§8.07].

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22 Smith v. Lewis, 107 Cal. Rptr. 95 (Cal. App. 1973), opinion superseded by 530 P.2d 589 (Cal. 1975)(expert testimony not required to prove lawyer’s failure to research applicable law); Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995)(expert testimony not required to prove lawyer’s failure to research facts about property descriptions in valuing estate taxes after lawyer was put on notice of their inaccuracy).
§4.06(c) Breach of Fiduciary Duty

Finally, many courts [§9.06] have held that juries do not need expert testimony [§9.08] to understand basic breaches of fiduciary duty, including the failure of a lawyer to obey a client’s instructions [§4.04], to communicate relevant legal advice and options,24 and to maintain client confidentiality [Chapter 5]. If you are not sure what your client wants, you must clarify your client’s objectives so that you can implement them. So if your client instructs you to draft an employment agreement or an estate plan, make sure that the client understands all of the relevant legal options, and make sure that you understand which options the client selects. Then draft the document competently to effectuate the client’s wishes. And don’t tell anyone else outside your firm what you have done, unless the client consents.

§4.07 WHAT TO DO IF YOU MAKE A MISTAKE

§4.07(a) The Blown Statute?

I think I missed a statute of limitations. Sure hope I don’t have to tell the client.

Physicians may bury their mistakes. Lawyers are not so lucky. Ours live to play another day. And it is our duty as fiduciaries to communicate with our clients about important developments in the matter, even when those developments do not exactly represent good news, even when the bad news is that we screwed up.

This does not mean the lawyer must admit liability or write a large check on the spot. Not all mistakes give rise to valid claims. If you blow the statute on a losing claim you are still free to defend on the latter basis. Your duty, however, is to tell the client the facts, explain that, as to this issue, you have an impossible conflict of interest and that the client would be well advised to seek other counsel who can provide objective advice.

24 dePape v. Trinity Health Systems, Inc., 242 E.Supp.2d 585, 609 (N.D. Iowa 2003) (expert testimony not required to prove lawyers liable for failing to give immigration client any information about visa options, which caused a failed fraudulent entry attempt and lost wages); Lane v. Oustalet, 873 So.2d 92 (Miss. 2004)(expert testimony not required to prove closing lawyer had a duty to provide buyers with copy of termite inspection report at closing).
§4.07(b) How To Avoid Even More Trouble

If you discover that you have missed a deadline, or that you forgot to include a clause in a contract as the client instructed, or that your failure to investigate mitigation evidence resulted in your client’s death penalty conviction, you need to respond. But you can get into even more trouble than your initial mistake has caused if you react with your first instinct (which may be to avoid the client or to settle the matter yourself). Because your mistake may have caused harm to a client, your error clearly affects “the status of the matter” under Model Rule 1.4 and therefore must be disclosed to your client (if you were the client, would you want to know?). Further, you now face an obvious personal conflict of interest and after fulfilling your communication obligation [§6.10], you probably should withdraw.

Red Flag

Disobey any thought of concealing or destroying evidence of your mistake or worse, creating evidence that someone else is responsible. All of these acts constitute dishonesty, deceit, or misrepresentation and will trigger disciplinary action that may not otherwise have occurred, or make the eventual disciplinary or monetary sanctions much more severe.25

First, you should inform your client of the relevant facts that led to your error,26 explain the nature of your conflict of interest (that you probably should withdraw because your client may have a claim against you),27 and advise your now former client in writing of the desirability of seeking the advice of independent legal counsel.28

Second, remember that you are subject to discipline if you settle the case with your former client unless that person or entity either has received disinterested legal advice from another lawyer not in your firm, or you have notified your former client in writing of the need for

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25 In re Morrissey, 305 F.3d 211 (4th Cir. 2002) (lawyer who, while suspended from practice, tried to bribe a Habitat for Humanity official in order to evade his community service obligations required by his criminal sentence, disbarred for engaging in criminal and dishonest conduct); Fla. Bar v. Miller, 863 So.2d 231 (Fla. 2003) (lawyer who disputed his failure to timely file suit when he knew he had failed to do so suspended from practice for one year); In re Chovanec, 640 N.E.2d 1052 (Ind. 1994) (lawyer who was not prepared and who falsely told court he was too sick to proceed subject to professional discipline).
26 Model Rule 1.4; RLGL §20.
27 Model Rule 1.7 (b); RLGL §122 comment g.
28 Model Rule 1.8(h)(2); RLGL §54.
independent counsel and given that person or entity a reasonable opportunity to seek such advice [§6.16]. Even then, if your former client was not independently represented, the law of agency will presume undue influence [§8.09], putting the burden of proof on you to prove that the settlement was fair and reasonable to the client. So send the client a disengagement letter [§1.25] complete with the disclosures listed in the last paragraph, and if a claim is made, call your liability carrier and turn the matter over to it. If you don’t have malpractice insurance, retain other counsel or call yourself a fool.

Your fiduciary obligation of competence and communication, which requires you to provide this information, actually may help you reduce the chance of a lawsuit or disciplinary complaint, or if either occurs, can reduce the severity of the outcome, because your client understands that you did the right thing once a mistake was uncovered. If you fail to inform the client, he or she reasonably may suspect that you have more to hide, and many jurisdictions toll the statute of limitations on your client’s malpractice claim until the time that person or entity reasonably should have known about the problem [§9.06]. So admit your error, start the clock ticking, and get on with your practice.

➤Ultimate Red Flag➤ Lawyers more than occasionally get into trouble with clients because they face some real trouble in their own lives. We explore these difficulties further in §10.10.

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29 Model Rule 1.8(h)(2); RLGL §54.
30 RLGL §54 comment c.