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## Better to be safe than sorry— accepting a case or reporting a potential claim

**T**he Court of Common Sense is back in session. Today, we will be taking questions on a lawyer's competence, notice under professional liability policies and a thorny courtroom decorum question.

**Q:** *When can a lawyer accept employment in a matter that is beyond her comfort zone or normal area of practice?*

**A:** A lawyer's competence forms the foundation of the Rules of Professional Responsibility and is codified at Illinois Rule of Professional Conduct 1.1.

Rule 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The comments to the rule elaborate on what it means to have legal knowledge and skill.

Comment 1, for example, states that to determine whether a lawyer has 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."

Comments to the rule make clear that expertise in a particular area of law may be required in some circumstances. On the other hand, a lawyer need not necessarily have special training or prior experience to handle a legal problem with which the lawyer is not familiar and that a newly admitted lawyer can be as competent as a practitioner with long experience. (See Comment 2.)

How does seemingly disparate guidance work in practice? Each competency determination will depend on the particular circumstance and on the various factors noted in Comment 1. As a general matter, however, take care in the

selection of your assignments and engagements.

For example, if you typically practice in insurance defense and would like to take on a plaintiff's personal-injury matter, you will likely have the competence to handle that unfamiliar litigation position. Conversely, if you are practicing in insurance defense and wish to provide advice related to taxation, you should tread with caution as tax is a field that generally requires some level of specialized experience.

Note that if you are nervous about handling a new matter outside of your comfort zone, you may associate with another lawyer that has expertise in that particular area. Remember, Rules 5.1 and 5.2 outline the responsibilities of supervising lawyers and subordinate lawyers with respect to conduct under the Rules of Professional Responsibility.

Also keep in mind that thoroughness and preparation are a critical part of the question of a lawyer's competence. Even if it is a matter with which you have considerable experience, if you do not prepare adequately, then you could be violating Rule 1.1. Adequate preparation includes attention and time on task in accordance with what is at stake, the complexity of the matter and the scope of the representation for which the lawyer is responsible. (See also Rule 1.2(c).)

*[U]nderwriters typically do not look at how many times you gave notice ... but rather to how much money the insurer had to pay ...*

**Q:** *My professional liability insurance policy requires notices of claims as well as notice of circumstances that may give rise to a claim, should I give notice every time a client is disgruntled or complains about the work product? I am concerned that giving notice may increase my premiums, is this true?*

**A:** This is a common question with an easy answer: Give notice early and often, even if you are unsure whether notice is appropriate. Your professional liability



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policy, which covers lawyers for professional negligence and other errors and omissions, is not like your automobile liability policy. Professional liability policies are typically written on a "claims made and reported" basis.

This means that the policy only covers claims for professional negligence and other misconduct made against you and reported to the insurer during the policy period. One hallmark of claims-made policies is strict notice requirements. Failure to give timely notice can result in a forfeiture of coverage.

Because the penalties for failing

to give notice can be harsh, you are incentivized to give notice of a claim (a defined term in the policy, which usually includes a demand for money, services or non-monetary relief, including entering into a tolling agreement), or circumstances that may give rise to a claim, as soon as and as often as possible.

Note that only actual claims that lead to payment will impact your premium. In sum, when calculating your premiums, the insurance

company underwriters typically do not look at how many times you gave notice under the policy, but rather to how much money the insurer had to pay under the policy, which are two different metrics.

In short, the best practice is to give notice any time you believe there are circumstances that may give rise to a claim. This way, if a claim eventually does arise from those circumstances, you are already protected on the notice issue.

**Q:** *Dear Court, as the seasons are changing, any advice on where should I put my coat in the courtroom?*

**A:** This is a more complicated question than you may have first imagined, and the answer differs depending on the judge and the court.

As with anything related to courtroom decorum, always know the judge's preference. For example, there are several federal judges who have very particular requirements for coats. Some will even interrupt the morning call to direct lawyers violating these preferences to comply. You will never be wrong in federal court if you hang your coat in the designated coat closets located either outside the courtroom or along the wooden panels forming the sides of the courtroom.

If you are at the Daley Center, each courtroom usually has coat racks on the left and right sides of the courtroom. Always look to hang your coat on the rack first. If the coat racks are full, as they often are in Chicago in the winter, you can place your coat over the back of the benches in the galley area. Take note, however, not to put your wet coat on the seats for an unsuspected lawyer to come and sit in your wet puddle.

You should also take care with placement of briefcases. Some judges (both federal and state court judges) dislike placement of briefcases on the counsel tables. Use your common sense; be respectful to both the court and your fellow lawyers; and you will not be wrong.

Until next time ... the Court of Common Sense is in recess.