RULE 1.1. COMPETENCE

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.

(c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

Background

The Louisiana Supreme Court amended this rule on March 29, 2006. It became effective, as amended, on April 15, 2006.

Model Rule Comparison

This rule is substantially similar to ABA Model Rule of Professional Conduct 1.1 (2002). Paragraph (a) is identical to the Model Rule. Paragraph (b) is not included in the ABA Model Rule, but is included in the Louisiana rule so that members of the Louisiana bar who fail to comply with mandatory continuing legal education requirements can be subjected to professional discipline under this rule and Rule 8.4(a). Paragraph (c) is not included in the ABA Model Rule, but was added to the Louisiana rule effective April 15, 2006 to subject a lawyer to discipline who fails to comply with annual registration requirements.

Comments to ABA Model Rule 1.1

Legal Knowledge and Skill

[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.

[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 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 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 regarding the scope of the representation may limit the matters for which the lawyer is responsible. *See* Rule 1.2(c).

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See* also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. *See* Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Annotations

Generally

The most fundamental obligation that a lawyer owes to a client is the duty to handle the client's matter competently. *See generally* Restatement (Third) of the Law Governing Lawyers § 16(2) (2000). Incompetent lawyering can lead not only to discipline[1] for violating Rule 1.1, *see, e.g.*, *In re Lee*, 85 So. 3d 74, 79 (La. 2012) (suspending a lawyer for two years for failure to understand basic succession law and for lacking thoroughness and preparation); *In re Young*, 849 So. 2d 25, 30 (La. 2003) (disciplining a lawyer for failure to prepare for criminal trial), but also to delictual liability for professional malpractice. In 2007, the Louisiana Supreme Court disciplined a lawyer under Rule 1.1(a) for incompetently investing a client's funds. *In re Pharr*, 950 So. 2d 636, 640-641 (2007) (holding that although the lawyer did not intentionally harm the client's financial interests, the lawyer's fiscal mismanagement was "the product of incompetence"). An improper disbursement of client funds

can violate Rule 1.1(a). *See In re Thomas*, 74 So. 3d 695, 699-701 (La. 2011) (noting that the lawyer's inability to adequately disburse funds for a client's debt demonstrated incompetence); *In re Gilbert*, 185 So. 3d 734 (La. 2016) (lawyer disbarred for engaging in comingling of client funds, neglecting legal matters, failing to effectively communicate with the clients and failing to withdraw from representation); *State v. Singleton*, 2015-1099 (La. Ct. App. 4th Cir. May 25, 2016) (finding that the public defender and lawyer had good cause to withdraw from representation because competent representation of the client would be impossible due to the shrinking budget for public defenders and increasing caseload); *In re Conry*, 158 So. 3d 786 (La. 2015) (lawyer claimed lawyer's inexperience in the practice of law caused mismanagement of the practice and argued ADHD was a cause of this, however, the committee found a pattern of misconduct and recommended disbarment, which the court agreed was warranted); *In re Cade*, 166 So. 3d 243 (La. 2015) (lawyer failed to diligently work on client's personal injury case, resulting in dismissal with prejudice; lawyer's license was suspended for one year, with six months deferred); *In re Mendy*, 217 So.3d 260 (La. 2016) (lawyer disbarred for neglecting legal matters, failing to return unearned fees, and failing to cooperate with ODC investigations).

DELICTUAL LIABILITY FOR MALPRACTICE

Elements

A plaintiff establishes legal malpractice under Louisiana law through proof (1) that there was a lawyer-client relationship, (2) that the lawyer was negligent, and (3) that the plaintiff suffered a loss caused by that negligence. *See, e.g., MB Industries, LLC v. CNA Ins. Co.,* 74 So. 3d 1173, 1184 (La. 2011); *Costello v. Hardy*, 864 So. 2d 129, 138 (La. 2004); *Brennan's, Inc. v. Colbert*, 191 So. 3d 1101 (La. Ct. App. 4th Cir. 2016); *Waste Mgmt. of Louisiana, LLC v. Penn-Am. Ins. Co.*, 110 So. 3d 200, 203 (La. Ct. App. 3 Cir. 2013); *Whittington v. Kelly*, 917 So. 2d 688, 692 (La. Ct. App. 2nd Cir. 2005); *Broadscape.com, Inc. v. Jones, Walker, Waechter, Poitevant, Carrere & Denegre, L.L.P.*, 866 So. 2d 1085, 1088 (La. Ct. App. 4th Cir. 2004); *Kosak v. Trestman*, 864 So. 2d 214, 218 (La. Ct. App. 4th Cir. 2003); *Spicer v. Gambel*, 789 So. 2d 741, 744 (La. Ct. App. 4th Cir. 2001); *Spellman v. Bizal*, 755 So. 2d 1013, 1017 (La. Ct. App. 4th Cir. 2000); *Johnson v. Tschirn*, 746 So. 2d 629, 631-32 (La. Ct. App. 4th Cir. 1999); *Francois v. Reed*, 714 So. 2d 228, 229-30 (La. Ct. App. 1st Cir. 1998); *Butler v. Chuzi*, 687 So. 2d 605, 606-07 (La. Ct. App. 4th Cir. 1997); *Finkelstein v. Collier*, 636 So. 2d 1053, 1058 (La. Ct. App. 5th Cir. 1994); *Dier v. Hamilton*, 501 So. 2d 1059, 1061 (La. Ct. App. 2d Cir. 1987). *See generally* Warren L. Mengis, *Professional Responsibility*, 46 La. L. Rev. 637, 642 (1986).

Existence of Lawyer-Client Relationship

To prove the existence of a lawyer-client relationship (prong one), the plaintiff must establish that he or she sought and received advice and assistance from the defendant-lawyer in matters pertinent to the lawyer's profession. *See State v. Green*, 493 So. 2d 1178, 1180-81 (La. 1986). "What is critical . . . is [that] a person must seek legal advice from [a lawyer] acting in his capacity as such." *Id.*; *see also LaNasa v. Fortier*, 553 So. 2d 1022, 1023-24 (La. Ct. App. 4th Cir. 1989). The Louisiana Supreme Court has stated that the Restatement (Third) of the Law Governing Lawyers § 14 provides some guidance in determining when a lawyer-client relationship arises. *In re Austin*, 943 So. 2d 341, 347 (La. 2006). The Restatement provides:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Under the Restatement and Louisiana case law, the existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists." See, e.g., *In re Austin*, 943 So.2d at 345; *Watson v. Franklin*, 198 So.3d 177, 180 (La. Ct. App. 2d Cir. 2016) (citing *Louisiana State Bar Ass'n v. Bosworth*, 481 So.2d 567, 571 (La.1986)). The "ultimate" issue, however, is "whether there is a reasonable, objective basis to determine that an attorney-client relationship was formed." *In re Austin*, 943 So. 2d at 348; *Watson*, 198 So. 3d at 177 (noting that a would-be client's "subjective belief must be a reasonable one" in order to form the relationship) (citing *Keith v. Keith*, 140 So.3d 1202, 1208 (La. Ct. App. 2d Cir. 2014)).

Professional Negligence

To prove negligence (prong two), the plaintiff must establish both the applicable duty of care and a breach of that duty. *See, e.g., Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990); *Ault v. Bradley*, 564 So. 2d 374, 379 (La. Ct. App. 1st Cir. 1990), writ denied, 569 So. 2d 967 (La. 1990). A Louisiana lawyer owes a client the duty "to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality." *Ramp v. St. Paul Fire & Marine Ins. Co.*, 269 So. 2d 239, 244 (La. 1972); *see also Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So. 2d 1109 (La. 1982); *Leonard v. Reeves*, 82 So. 3d 1250, 1257 (La. Ct. App. 1 Cir. 2012) (noting that the "legal standard of care may vary depending upon the particular circumstances of the [attorney-client] relationship"); *Sherwin-Williams Co. v. First La. Constr., Inc.*, 915 So. 2d 841, 844-45 (La. Ct. App. 1st Cir. 2005); *Burris v. Vinet*, 664 So. 2d 1225, 1229 (La. Ct. App. 1st Cir. 1995); *Leonard v. Stephens*, 588 So. 2d 1300, 1304 (La. Ct. App. 2d Cir. 1991); *Nelson v. Waldrup*, 565 So. 2d 1078, 1079 (La. Ct. App. 4th Cir. 1990); *Reed v. Verwoerdt*, 490 So. 2d 421, 427 (La. Ct. App. 5th Cir. 1986). However, a lawyer is "not required to exercise perfect judgment in every instance." *See Reeves*, 82 So. 3d 1250, 1257; *Spellman v. Bizal*, 755 So. 2d 1013, 1017 (La. Ct. App. 4th Cir. 2000). A plaintiff typically establishes the applicable standard of care through expert testimony from a lawyer familiar with law practice in the relevant locale. *See Geiserman*, 893 F.2d at 791 (quoting 2 R. Mallen & J. Smith, *Legal Malpractice* § 27.15, at 667, 668-69 (4th ed. 1995)); *Dixon v. Perlman*, 528 So. 2d 637, 642 (La. Ct. App. 2d Cir. 1988) (noting that expert testimony will usually, but not always be required); *see also Reed*, 490 So. 2d at 427 (requiring expert testimony); *Stephens*, 588 So. 2d at 1304; *Morgan v. Campbell, Campbell & Johnson*, 561 So. 2d 926, 929 (La. Ct. App. 2d Cir. 1990); *Houillon v. Powers & Nass*, 530 So. 2d 680, 681-82 (La. Ct. App. 4th Cir. 1988). Similarly, whether the defendant-lawyer breached the applicable standard is "a fact specific question and must ordinarily be established through expert . . . testimony." [2] *Dickey v. Baptist Mem. Hosp. N. Miss.*, 146 F.3d 262, 265 (5th Cir. 1998) (discussing the establishment of the applicable standard of care in a medical malpractice case). However, in cases of "obvious negligence, the court may, without expert testimony, take judicial notice of a legal duty which was breached by an attorney." *Nelson*, 565 So. 2d at 1079 (citing Ramp, 269 So. 2d at 239); *see also MB Indus., LLC v. CNA Ins. Co.*, 74 So. 3d 1173, 1185 (La. 2011) (recognizing no need for expert testimony when it was clear the "defendant attorney committed 'gross error'"); *Geiserman v. MacDonald*, 893 F.2d 787, 793-94 (5th Cir. 1990) (stating that expert testimony may

not be required in cases of "egregious negligence"); *Morgan*, 561 So. 2d at 929 (finding that expert testimony is not required in cases involving an obvious breach of the duty of care); *Dixon*, 528 So. 2d at 642 (concluding that expert testimony may not be required when the trial court is "familiar with the standards of practice in its community").

Causation and the Case-Within-A-Case

Once the plaintiff-client has proven the existence of a lawyer-client relationship (prong one), and that the lawyer's conduct was negligent (prong two), the client has established a prima facie case that the lawyer's conduct caused the client to suffer some loss (prong three). Thereafter, the burden "shifts to the defendant attorney to prove that the client could not have succeeded on the original claim." *See, e.g.*, *Johnson v. Tschirn*, 746 So. 2d 629, 632 (La. Ct. App. 4th Cir. 1999) (internal quotation omitted) (citing *Nelson v. Waldrup*, 565 So. 2d 1078 (La. Ct. App. 4th Cir. 1990); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So. 2d 1109 (La. 1982)). The law shifts the burden in this manner because it presumes that the defendant-lawyer would not have handled the client's claim if it were completely devoid of merit.[3]he inference of causation of damages can easily be made in cases where the attorney enters into a 'relationship' with a client on the premise that the client has a valid cause of action, or on a contingency fee basis." *Broadscape.com*, 866 So. 2d at 1089 (La. Ct. App. 4th Cir. 2004).] For this reason, the client is not required to prove that the negligence caused him to lose his underlying case by trying a "case within a case." *See Jenkins*, 422 So. 2d at 1110; *Dier v. Hamilton*, 501 So. 2d 1059, 1061 (La. Ct. App. 2d Cir. 1987). On the contrary, the defendant-lawyer must go forward with evidence that the client would have lost[4] notwithstanding the lawyer's impropriety or negligence. *See Jenkins*, 422 So. 2d at 1110.

Relevance of Violation of a Rule of Professional Conduct

Whether a lawyer's violation of a rule of professional conduct is relevant to a claim for malpractice is a controversial issue. The "Scope" section of the ABA Model Rules of Professional Conduct states that "[t]he Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." Model Rules of Professional Conduct Scope ¶ [20] (2002). Notwithstanding this statement, most jurisdictions permit experts to consider a disciplinary rule in "understanding and applying" the applicable standard of care if the rule is designed to protect the plaintiff and is relevant to the claim. *See* Restatement (Third) of the Law Governing Lawyers § 52(2) (2000); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 Harv. L. Rev. 1102, 1119 (1996) (arguing that the "logic, feasibility, [and] functional value" warrant applying the Model Rules to the malpractice context); Model Rules of Professional Conduct Scope ¶ [20] (2002) (conceding that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct").

Unconstrained by the limiting language in the "Scope" section of the ABA Model Rules, Louisiana courts consider the Louisiana Rules of Professional Conduct to have the full force and effect of substantive law. *See e.g.*, *Dazet Mortgage Solutions LLC v. Faia*, 116 So. 3d 711, 716 (La. App. Ct. 5th Cir. 2013); *In re Huddleston*, 655 So. 2d 416, 422 (La. Ct. App. 5th Cir. 1995); *Soderquist v. Kramer*, 595 So. 2d 825, 829 (La. Ct. App. 2d Cir. 1992). Thus, the Louisiana Rules of Professional Conduct create legal duties that are enforceable against a Louisiana lawyer in malpractice actions. *See Schlesinger v. Herzog*, 672 So. 2d 701, 707 (La. Ct. App. 4th Cir. 1996) (holding that the Rules of Professional Conduct "have the force and effect of substantive law" and transform ethical issues into legal duties); *Dier v. Hamilton*, 501 So. 2d 1059, 1061 (La. Ct. App. 2d Cir. 1987) (holding that alleged violation of Louisiana ethics rules on conflicts of interest established prima facie case of professional impropriety for purposes of legal malpractice action). However, liability based on such a rule-based duty turns on whether the rule in question exists to protect the plaintiff from the particular harm suffered. *See, e.g., Smith v. Haynsworth, Marion, McKay & Geurard*, 472 S.E.2d 612, 613-15 (S.C. 1996); *see also Gresham v. Davenport*, 537 So. 2d 1144, 1147 (La. 1989); *Tassin v. State Farm Ins. Co.*, 692 So. 2d 604, 608 (La. Ct. App. 3d Cir. 1997). The duty of competence prescribed by Rule 1.1 clearly is intended to protect clients.

Prescription and Preemption of Lawyer Malpractice Claims

Louisiana Revised Statutes section 9:5605[5] sets forth a prescriptive[6] period of one year for all legal malpractice claims against a Louisiana lawyer: "No action for damages against any attorney at law duly admitted to practice in this state . . . whether based upon tort, or breach of contract, or otherwise . . . shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered . . . ." La. Rev. Stat. Ann. § 9:5605(A). Actions for malpractice are also subject to a three-year preemptive[7] period: "[E]ven as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect." *Id.* The Louisiana Supreme Court has held that:

> The 'date of discovery' from which prescription or peremption begins to run is the date on which a reasonable man in the position of the plaintiff has, or should have, either actual or constructive knowledge of the damage, the delict, and the relationship between them sufficient to indicate to a reasonable person he is the victim of a tort and to state a cause of action against the defendant. Put more simply, the date of discovery is the date the negligence was discovered or should have been discovered by a reasonable person in the plaintiff's position.

Teague v. St. Paul Fire & Marine Ins. Co., 974 So. 2d 1266, 1275 (La. 2008) (citations omitted).

Continuous Representation and Contra Non Valentem

The contra non valentem doctrine and continuous representation rule do not suspend or interrupt the peremptive periods set forth in section 9:5605. In *Hendrick v. ABC Ins. Co*., 787 So. 2d 283 (La. 2001), the Louisiana Supreme Court held as follows:

> The attorney-client relationship is built on trust[,] and the continuous representation rule as encompassed by *contra non valentem* seeks to protect clients who rely on that trust and fail to file legal malpractice suits against their attorneys within the appropriate prescriptive period. *Contra non valentem* does not suspend prescription when a litigant is perfectly able to bring his claim, but fails to do so. When a client does not innocently trust and rely upon his attorney, but rather actively questions his attorney's performance, the client may be denied the safe harbor of contra non valentem if equity and justice do not demand its application.

Id. at 293. However, this opinion did not specifically address whether the continuous-representation rule applied to the period set forth in section 9:5605. *See id.* at 289-93. *See, e.g., Reeder v. North*, 701 So. 2d 1291 (La. 1997); *Pena v. Williams*, 867 So. 2d 801 (2004) (La. Ct. App. 4th Cir. 2004); *Atkinson v. LeBlanc*, 860 So. 2d 60 (La. Ct. App. 5th Cir. 2003). In 2012, the Louisiana Supreme Court in *Jenkins v. Starn*. 85 So. 3d 612 (La. 2012), squarely held that the continuous-representation rule does not suspend or interrupt the peremptive period set forth in La. R.S. 9:5605(B). *Id.* at 626.

Fraud By the Lawyer

The peremptive periods set forth in the Louisiana Revised Statutes "shall not apply in cases of fraud, as defined in Civil Code Article 1953." *Id*. § 9:5605(E). For this exception to apply, however, the plaintiff must "state a cause of action for fraud" in his petition by alleging "both a misrepresentation, suppression, or omission of true information and the intent to obtain an unjust advantage or to cause damage or inconvenience to another." *Fenner v. DeSalvo*, 826 So. 2d 39, 44 (La. Ct. App. 4th Cir.

2002). Thus, this exception does not apply if the plaintiff simply recites the word "fraud" in his petition without more particular allegations. *See id.* As to whether the fraud exception in subsection E applies to the statute's one-year period, three-year period, or both, *see Dauterive*, 811 So. 2d at 1252-53.

In *Lomont v. Myer-Bennett*, 172 So. 3d 620 (La. 2015), the Louisiana Supreme Court expanded the scope of this "fraud exception" in three significant respects. First, the court overruled prior caselaw holding that "post-malpractice actions consisting of fraudulent concealment cannot amount to fraud." Said the court:

> [U]nder the clear wording of the statute and the Code article, any action consisting of "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other" will prohibit application of the peremptive period. Concealment of malpractice to avoid a malpractice claim conforms to this definition. It would be absurd to interpret the statute to exclude fraudulent concealment of the malpractice. There is no support for an interpretation that would allow attorneys to engage in concealment of malpractice until the three-year peremptive period has expired.
>
> *Id.* at 10.

Second, the court held that "fraud" sufficient to halt the running of peremption can arise simply from a lawyer's silence in the wake of an act of malpractice. Because Louisiana Rule of Professional Conduct 1.4 requires a lawyer to keep the client "reasonably informed," a lawyer's failure to notify the client of the lawyer's own malpractice can constitute a fraudulent act sufficient to trigger the exception. *See id*. at 19.

Third, the court held that when a lawyer fraudulently conceals an act of malpractice, that fraudulent concealment serves to prevent the running of any peremptive or prescriptive periods until the client becomes "aware of the deception" and learns of the possible malpractice claim. *See id*. at 26.

As a practical matter, the *Lomont* decision portends a significant expansion of liability for legal malpractice in Louisiana. Historically, courts have dismissed a large percentage of legal malpractice claims due to peremption. After *Lamont*, however, peremption may foreclose a malpractice action only in those (few) malpractice cases in which the lawyer has expressly informed the client of the act of malpractice.

Limitation of Malpractice Liability and Structured Settlements

Under Louisiana Revised Statutes § 37:222(A), "[a]n attorney who acts in good faith shall not be liable for any loss or damages as a result of any act or omission in negotiating or recommending a structured settlement of a claim or the particular mechanism or entity for the funding thereof or in depositing or investing settlement funds in a particular entity, unless the loss or damage was caused by his willful or wanton misconduct." Under this provision, "'[g]ood faith' is presumed to exist when the attorney recommends or negotiates, invests, or deposits funds with an entity which is funded, guaranteed, or bonded by an insurance company which, at the time of such act, had a minimum rating of 'A+9' or 'Double A', or an equivalent thereof, according to standard rating practices in the insurance industry." La. Rev. Stat. Ann. § 37:222(B)(2).

Malpractice in Criminal Defense Practice

A cause of action for legal malpractice against a criminal defense lawyer exists even prior to final disposition of the underlying criminal case. Therefore, a potential plaintiff need not–and should not–delay filing such a claim until all writ applications and post-conviction proceedings have been exhausted. *See Augman v. Colwart*, 874 So. 2d 191, 194 (La. Ct. App. 1st Cir. 2004) ("[T]he date of the negligent act itself, not the judgment giving definitive effect to that act, triggers the one-year and three-year periods.").

The caseload of criminal defense counsel should not, "by reason of its excessive size or complexity, interfere[] with providing quality representation, endanger[] a client's interest in independent, thorough, or speedy representation, or [have] a significant potential to lead to the breach of professional obligations." ABA Stds. Relating to the Admin. of Crim. Justice–The Def. Function std. 4–1.8(a).

In providing reasonably adequate death-penalty representation, capital defense counsel should consult and consider the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The United States Supreme Court, however, has made clear that these standards are "guides to what reasonableness means, not its definition." *E.g., Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (internal quotations omitted).

Mandatory Continuing Legal Education

A Louisiana lawyer must attend a total of twelve and one-half hours of qualified continuing legal education classes each year, unless a specific exception or exemption applies. Of these twelve and one-half hours, one hour must concern ethics and one must concern professionalism. *See* La. Sup. Ct. R. XXX(3)(a) & 3(c). The Louisiana Supreme Court has been relatively harsh in disciplining lawyers who do not comply with MCLE and dues-paying obligations in a timely manner. For example, in *In re McCarthy* the court suspended a lawyer for six months for failing to complete mandatory continuing legal education, failing to timely pay his annual bar dues and prior disciplinary assessment, and subsequently practicing law during these periods of ineligibility. 972 So.2d 1143, 1144 (La. 2008). Likewise, in *In re Moeller* the court suspended a lawyer for a significant period of time for long history of noncompliance with MCLE requirements and dues payments. 111 So. 3d 325, 327-28 (La. 2013) (noting that it was of no consequence that no actual harm occurred); *In re Teissier*, 171 So. 3d 906 (La. 2015) (lawyer failed to comply with mandatory continuing legal education requirements, and to pay bar dues and disciplinary assessment).

No Duty to Carry Legal Malpractice Insurance

The Louisiana Supreme Court does not require Louisiana lawyers to carry malpractice insurance or to disclose whether they do so. In 2004, the American Bar Association adopted a "Model Rule on Insurance Disclosure." *See* ABA Model Rule on Insurance Disclosure (Aug. 10, 2004). The purpose of the model court rule was to provide potential clients with access to information to make "an informed decision about whether to hire a particular lawyer." *Id*. This model rule requires each licensed lawyer to certify "whether the lawyer is currently covered by professional liability insurance," and "whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law." The rule exempts any lawyer employed as "a full-time government lawyer" or employed "by an organizational client." *Id*.

Since 2004, several states have adopted an insurance disclosure requirement by mandating disclosure either on bar-registration statements (18 states) or directly to potential clients (7 states); six states have rejected the ABA model rule (Arkansas, Connecticut, Florida, Kentucky, North Carolina, and Texas); and one state requires its lawyers to carry legal malpractice insurance (Oregon). *See* ABA Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure (updated Apr. 6, 2015).

Although Louisiana lawyers are not required to carry malpractice insurance, it is readily available. The Louisiana State Bar Association's endorsed insurance program is administered by Gilsbar (incidentally, the name "Gilsbar" is an acronym that stands for *G*roup *I*nsurance *L*ouisiana *S*tate *BAR*). For more information on this program, visit the LSBA website.

Technological Competence

In 2012, the ABA adopted an amendment to ABA Model Rule of Professional Responsibility 1.1, comment 8, noting that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." *See* ABA, Commission on Ethics 20/20 Resolution 105A (August 2012). Thus, a Louisiana lawyer should acquire and maintain a minimum level of competency with the use of modern technology, including the use of email for lawyer-client and lawyer-lawyer communication, creating PDF files, searching and advising clients about social media, and using online resources for legal research and fact investigation.

A cautionary tale from Florida demonstrates why a competent lawyer who uses email- and all should- must understand the considerable risk associated with automatic, background spam filtering. A lawyer should never trust a spam filter. Instead, a lawyer should routinely scan the lawyer's spam inbox to look for improperly classified communications. *See Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC,* CaseNo. 1D 15-5714 (Fla. 1st DCA 2017).

Mandatory CLE Credit for Pro Bono Service

Effective May 1, 2015, the Louisiana Supreme Court Rules for Continuing Legal Education to grant up to three hours of mandatory continuing legal education credit for pro bono legal work:

> Credit may also be earned through providing uncompensated pro bono legal representation to an indigent or near indigent client or clients. To be eligible for credit, the matter must have been assigned to the Member by a court, a bar association, or a legal services or pro bono organization that has as its primary purpose the furnishing of such pro bono legal services and that has filed a statement with the Louisiana Committee on MCLE. A Member providing such pro bono legal representation shall receive one (1) hour of CLE credit for each five (5) hours of pro bono representation, up to a maximum of three (3) hours of CLE credit for each calendar year. To receive credit, the Member shall submit MCLE Form 6 ("Application for CLE Credit for Pro Bono Services").

See La. Sup. Ct. Rule XXX, Rule 3, Regulation 3.21.

Discipline

When a lawyer's incompetence causes injury or potential injury to a client, the following sanctions are generally appropriate: *disbarment,* when the lawyer does not understand "the most fundamental legal doctrines or procedures"; *suspension,* when the lawyer engages in an area of practice in which the lawyer knows he is not competent; and, *reprimand,* when the lawyer either fails to understand relevant legal doctrines or procedures, or is negligent in determining whether he is competent to handle a legal matter. ABA Stds. for Imposing Lawyer Sanctions stds. 4.51-4.53 (1992). If a lawyer's incompetence causes little or no actual or potential injury to a client, *admonition* is generally the appropriate sanction when the lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter. *Id.* Std. 4.54. The Louisiana Supreme Court has noted that "a short suspension is the appropriate discipline for failure to render competent representation." *In re Downing*, 930 So. 2d 897, 904 (La. 2006) (citing *In re Young*, 849 So. 2d 25 (La. 2003)). The Louisiana Supreme Court has also held that although a lawyer's state of mind is not a defense to incompetence, it is a relevant factor in determining an appropriate sanction. *In re Pharr*, 950 So. 2d 636, 641 (La. 2007) (holding disbarment would be unduly punitive where the lawyer did not intend to harm a client's financial interests and where the lawyer entered into a consent judgment to compensate the client's losses).

Notes

This page was updated on January 16, 2018.

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1. In most cases, discipline imposed for violations of Rule 1.1 stems from the lawyer's failure to thoroughly prepare and prosecute a matter rather than from the lawyer's lack of "knowledge" or "skill." For this reason, disciplinary actions brought under this rule are often accompanied with alleged violations of Rule 1.3 (diligence). *See, e.g*, *In re Mendy*, 81 So. 3d 650 (La. 2012); *In re Andrus*, 814 So. 2d 1283 (La. 2002); *In re Landry*, 728 So. 2d 833 (La. 1999); *In re Grady*, 731 So. 2d 878 (La. 1999). ↵
2. For a case finding that a lawyer did not breach any applicable standard of care, see *Spellman v. Bizal*, 755 So. 2d 1013 (La. Ct. App. 4th Cir. 2000) (no breach for withdrawing as counsel of record when no motions pending and no trial date set). ↵
3. The Fourth Circuit has held that "[t ↵
4. Put another way, a lawyer's malpractice is a cause in fact of damage to his client when proper performance by the lawyer would have prevented the harm. *See Schwehm v. Jones*, 872 So. 2d 1140 (2004) (La. Ct. App. 1st Cir. 2004); *see also Ault v. Bradley*, 564 So. 2d 374, 379 (La. Ct. App. 1st Cir. 1990). ↵

5. "The prescriptive and peremptive period" for all legal malpractice claims against Louisiana lawyers "shall be governed exclusively by this section." *See* La. Rev. Stat. Ann. § 9:5605(C) (emphasis added).
6. There is caselaw in Louisiana holding that the one-year period set forth in section 9:5605 is actually a peremptive period rather than a prescriptive period. For an exhaustive discussion of this issue, *see Dauterive Contractors, Inc. v. Landy & Watkins*, 811 So. 2d 1242, 1252 (La. Ct. App. 3d Cir. 2002) ("We hold that both the one-year and three-year periods are peremptive and are subject to all rules governing peremption.").
7. Note that the peremptive period does not apply "in cases of fraud, as defined in Civil Code Article 1953." Id. § 9:5605(E). For this exception to apply, however, the plaintiff must "state a cause of action for fraud" in his petition by alleging "both a misrepresentation, suppression, or omission of true information and the intent to obtian an unjust advantage or to cause damage or inconvenience to another." *Fenner v. DeSalvo*, 826 So. 2d 39, 44 (La. Ct. App. 4th Cir. 2002). Thus, this exception does not apply if the plaintiff simply recites the word "fraud" in his petition without more particular allegations. *See id.* As to whether subsection E applies to the statute's one-year period, three-year period, or both, *see Dauterive*, 811 So. 2d at 1252-53 & supra note 66.

5 THOUGHTS ON "RULE 1.1. COMPETENCE"

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