

Duty of Competence: A Case Study

Competence is a bedrock obligation of every lawyer in every setting, even pro-bono representation, and deviation from the standard of practice may qualify as professional malpractice.

By **Ellen L. Koblitz and Kim D. Ringler** | December 16, 2020

Competence is a bedrock obligation of every lawyer in every setting. The Rules of Professional Conduct in fact begin with an explicit requirement of competence. RPC 1.1 prohibits lawyers from handling or neglecting a matter in a manner constituting gross negligence or exhibiting a pattern of negligence or neglect. Competence is “the cornerstone for the rest of the rules.” NJ Supreme Court Advisory Committee on Professional Ethics, Opinion 671 (1993). The Committee noted that even when an attorney has no prior experience in an area of law, the attorney may be able to provide competent advice by engaging in “some combination of education, study, reflection, experience, research and other background.” *Id.*

Regardless of the legal setting and circumstances, deviation from the standard of practice may qualify as professional malpractice, a basis for reversal and unethical conduct. Examples of conduct falling sufficiently short of the standard of competence that warranted disciplinary action include:

- a. Ignoring an estate matter for years, becoming paralyzed by not knowing how to handle the matter, among other transgressions, *In re Kantor*, 180 N.J. 226 (2004) (respondent lawyer was disbarred);
- b. Failing to prepare for trial as a municipal prosecutor, *In re Segal*, 130 N.J. 268 (1992) (public reprimand);
- c. Failing to memorialize an agreement among other failures of due diligence, *In re Albert*, 120 N.J. 698 (1990) (three-month suspension); or
- d. Drafting grossly deficient documents due to lack of experience with promissory notes, *In re Wallace*, 104 N.J. 589 (1986) (six months suspension from practice).

The obligation applies to pro bono representation to the same extent as to compensated legal services. Advisory Committee Opinion 671, *supra*. The decisions and tortured history of a recent case, *In Re the Adoption of a Child by C.J.*, 463 N.J. Super. 254 (App. Div. 2020), highlight the consequences of failing to provide competent legal representation undertaken pro bono.

What does an appellate court do when an appointed pro bono lawyer presents an obviously subpar brief in an appeal that effects the fundamental welfare of a child and mother? That is the question presented in *In re the Adoption of a Child by C.J.* The New Jersey appellate court answered by adjourning the appeal and appointing new appellate counsel, who was ultimately successful in overturning the termination of appellant’s parental rights in another precedential opinion issued six months later.

New Jersey has an expansive view of the right to counsel, applying it even in municipal court if a significant fine may be imposed. *State v. Hermanns*, 278 N.J. Super 19, 29 (App. Div. 1994). Parents are afforded counsel through the Office of the Public Defender (OPD) in child welfare cases and indictable criminal matters. In 2016, the New Jersey Supreme Court determined that an indigent parent facing the termination of parental rights in a contested adoption case is also entitled to counsel, appointed from the bar because the OPD is not statutorily required to afford counsel. *In Re the Adoption of a Child by J.E.V.*, 226 N.J. 90, 113. The right to counsel includes the right to appellate counsel. Very few contested adoption trials take place in New Jersey, and only a handful of appeals have been taken since the right to counsel was spelled out.

When the appellate court reviewed the documents for the C.J. adoption case, it noticed that the trial judge seemingly made no findings of fact or conclusions of law. After the trial, an order was issued. Neither appellate brief mentioned the lack of findings. Further investigation of court records revealed that the transcript of the judge's decision had not been ordered by respondent's lawyer, who was directed to provide transcripts.

Appellant's brief had been submitted more than a year after it was due, after a motion to accept it "as is" was granted due to counsel's failure to correct deficiencies. The brief was a mere five pages long. It incorrectly cited to the statute involved when the State seeks a termination of rights in a child welfare case, and it provided no case authority whatsoever. When respondent's brief correctly pointed out the applicable contested adoption statute, counsel did not exercise appellant's right to reply. Neither counsel requested oral argument.

The appellate court had to decide what to do in this situation. Should both counsel be afforded the normal opportunity to address the new issue of ineffective assistance of appellate counsel? Should the court determine that appellant's counsel was ineffective without reviewing the trial court's decision to determine whether counsel's errors effected the outcome? And finally, other than administratively appointing new appellate counsel, what more needed to be said to meet the court's responsibilities to the bar, the litigants and the public?

New Jersey lawyers are required to provide legal services gratis when appointed by the courts, most often to handle a municipal appeal or to represent a defendant charged with violating a domestic violence order. (In the Bergen vicinage alone, the County provides paid counsel to represent individuals who are charged with non-payment of child support as well as those charged with contempt of a domestic violence order.) In *C.J.*, the mother's appellate counsel was appointed to serve pro bono, providing legal services evidently far outside counsel's usual area of practice.

The C.J. court determined that a published, precedential decision would be helpful to emphasize: 1) the need to represent clients responsibly when assigned by the courts, 2) what to do if the lawyer is unable to handle the assignment, and 3) the resources available on the court website to help lawyers assigned in each case-type.

The appellate court wrote: "The fair administration of justice as well as indigent litigants who are entitled to counsel rely on the generous and diligent efforts of pro bono counsel, both volunteer

and assigned. Lawyers are ethically bound to provide representation that is reasonably diligent and not grossly negligent. This is true whether counsel is financially compensated or is providing pro bono representation.” It stated: “It was appellate counsel’s obligation to review the New Jersey Courts website material concerning contested adoptions and Part II of the Court Rules covering appeals. Alternatively, counsel could have retained substitute counsel with expertise in this area. If counsel is unable to obtain sufficient knowledge or retain counsel with expertise, counsel has the ethical obligation to inform the appointing court of his or her inability to handle the case assigned.” The court pointed out the excellent resources available to attorneys at njcourts.com by clicking on “Attorneys” and then “Pro Bono” under the “Resources” section at the bottom right corner of the page.

The opinion was issued on April 28, 2020, and resulted in the highly unusual published disposition neither affirming nor reversing, but rather adjourning the appeal. New counsel was appointed, and six months later, on Oct. 28, 2020, another appellate panel issued a precedential published opinion reversing and delineating the proper standard for a court to apply in a contested adoption. Appellant’s success demonstrates the extraordinary importance of competent counsel, and why New Jersey requires competent appointed counsel in all cases with significant repercussions.

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