

# Maine Ethics for In-house Counsel

## ETHICS IN NEGOTIATIONS



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# Ethical Dilemmas Involving Negotiations

1. What is the balance between our ethical obligations as attorneys and the goal of securing the best possible deal for our clients?
2. How do we balance preserving confidences and avoiding material misstatements?
3. What is a material statement v. a nonmaterial statement in the context of negotiations?
4. When is silence not OK?
5. Are the Model Rules the single source of guidance for ethical negotiations?

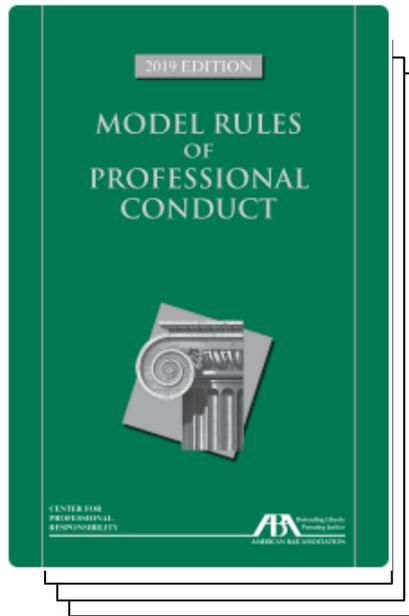


# Ethical Duties During Negotiations

1. Competency
2. Confidentiality
3. Fairness
4. Cooperation
5. Truthfulness



# Rule 4.1: Truthfulness in Statements to Others



*In the course of representing a client a lawyer shall not knowingly:*

*(a) make a false statement of material fact or law to a third person; or*

*(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6*

# ABA Comment 2 to Rule 4.1

[2]

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

# Maine Rule 4.1: Truthfulness in Statements to Others

- Follows ABA Model Rule
- In the course of representing a client a lawyer shall not knowingly:
  - (a) make a false statement of material fact or law to a third person; or
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- ABA Comment 2 adopted in Maine.

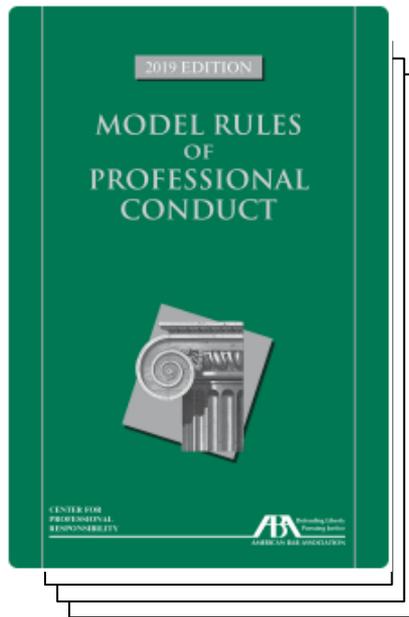
# Hypothetical

- After negotiating a contract on behalf of your company (a large technology company) with a large bank, you are almost done. You and counsel for the bank have just finalized the last provision, concerning a cap on your client's liability. After a lot of back and forth, you have agreed to uncapped liability for your company for a variety of costs associated with data breaches, should a breach of the bank's information happen while in your company's possession. That's why you're surprised to see, when you receive revisions to the contract back from the other side, that the other side did not delete a provision that caps your company's liability for one of the big categories of data breach costs that the other side expressly requested be uncapped. This contradicts your discussions but is definitely a much better arrangement for you. You talk about this with your business team, and they ask for your opinion about what should be done. Do you advise that you:
  - a. Say nothing to the other side and accept the change, assuming that they are sophisticated and should have caught this issue if it mattered;
  - b. Let the other side know that you noticed the revision and wanted to confirm this is what they intended to propose;
  - c. Accept the change but summarize the allocation of liability very clearly in a margin comment, including that this particular item is uncapped.

# Hypothetical

- You're just finishing up negotiating a settlement agreement on behalf of your company with an attorney for a small entrepreneur who just sold her business to your company. The dispute arose out of the entrepreneur's claims that your company underpaid her for her business, the sale price for which was based on a complex calculation involving the purchased business' past and anticipated revenue. The settlement provides for a payment by your company to the entrepreneur of a further amount based in part on that formula, which your calculations show should result in an additional payment to them of ~\$300,000. But, when you get back the proposed settlement from the other side's lawyer, their calculations show a payment by your company of only ~\$100,000. After digging into their proposal, you realize that they have made a calculation error. Do you:
  - a. Say nothing to the other side; or
  - b. Let the other side know that you noticed the error and wanted to correct it.

# Rule 3.1: Meritorious Claims and Contentions



*A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.*

# ABA Comment to Rule 3.1

[2]

... What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

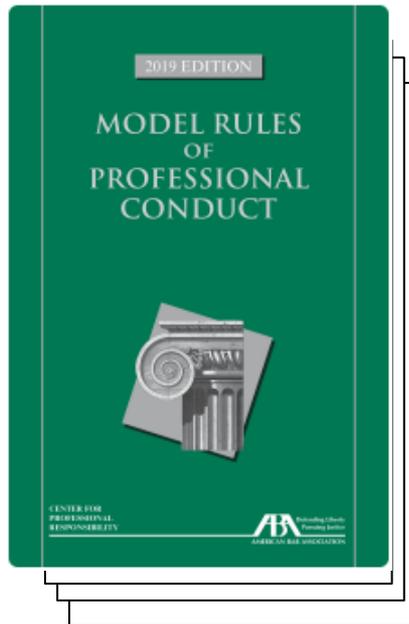
# Maine Rule 3.1 (b): Meritorious Claims and Contentions

- “(b) A lawyer shall not report or threaten to report misconduct to a criminal, administrative or disciplinary authority solely to obtain an advantage in a civil matter.

# Hypothetical

- A consumer product manufacturer is negotiating a new contract with an existing material supplier. A lawsuit had just been filed against the manufacturer that will impact other sources of supplies. The successful execution of the new contract is critical to manufacturer production.
- During the negotiation of pricing terms, the vendor manager tells supplier that manufacturer has a source of supplies from competitors at a fraction of the cost being proposed. Vendor manager also states that he is only at the table due to the historic relationship, but that existing supplier potential future business is not in any way guaranteed.
- Counsel for manufacturer knows that existing supplier will soon become aware of the legal issues of manufacturer impacting its other source of supplies. Counsel should:
  - a. Say nothing and hope the lawsuit goes away
  - b. Advise the Vendor Manager to correct his statements
  - c. Let the opposing counsel know of the legal issues.

# Rule 1.2: Scope of Representation and Allocation of Authority



*a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.*

*(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.*

*(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.*

*(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*

# Maine Rule 1.2: Scope of Representation and Allocation of Authority

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Subject to the Rules with respect to Declining or Terminating Representation (Rule 1.16), a lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client provides informed consent after consultation. If, after consultation, the client consents, an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding. A lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto that is filed with the court, may not thereafter limit representation as provided in this rule, without leave of court.

(d) A lawyer, who under the auspices of a non-profit organization or a court-annexed program provides limited representation to a client without expectation of either the lawyer or the client that the lawyer will provide continuing representation in the matter, is subject to the requirements of Rules 1.7, 1.9, 1.10 and 1.11 only if the lawyer is aware that the representation of the client involves a conflict-of-interest.

(e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law

# Hypothetical

You've been negotiating the sale of some property owned by your company. The buyer has made an attractive offer that you have orally accepted. Your business executive is pleased with the terms as they stand but has suggested that you go back to buyer and tell them that they have to sweeten the offer just a bit in order to get "buy-in" back with your company's leadership. "No harm in asking," your executive says. What would you do?

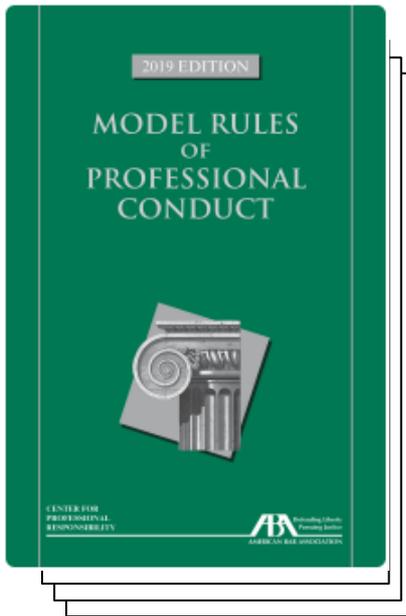
- a. Tell your executive that you've already given your word to the buyer and that you're uncomfortable going back on it.
- b. Do exactly what your executive suggests. It's a common bargaining tactic, after all.
- c. Meet with the buyer and ask if they can sweeten the price, though make it clear that this isn't a deal breaker.

# Hypothetical

You are in the midst of a negotiation for an online software solution that will help your company to manage on of its “mission critical” core business operations. Unbeknownst to the other side, the contract for your current solution, which this new solution is replacing, is set to expire in two months, and you have no other alternatives to the expiring solution. Timing is therefore the most critical aspect of this negotiation from the company’s perspective, and your CEO has indicated that he will sign the contract “as is” if necessary. On the call with the other side, their attorney asks, “How important is timing to you?” Which of the following comes closest to how you would respond?

- a. “Timing isn’t a concern.”
- b. “We really need to get this done in two months, and you’re our only hope.”
- c. “Timing is an important issue for us, alongside a number of other factors.”

# Rule 8.4: Maintaining the Integrity of the Profession



*“It is professional misconduct for a lawyer to:  
(a) violate...the Rules of Professional Conduct...  
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...”*

# Maine Rule 8.4: Maintaining Integrity of the Profession

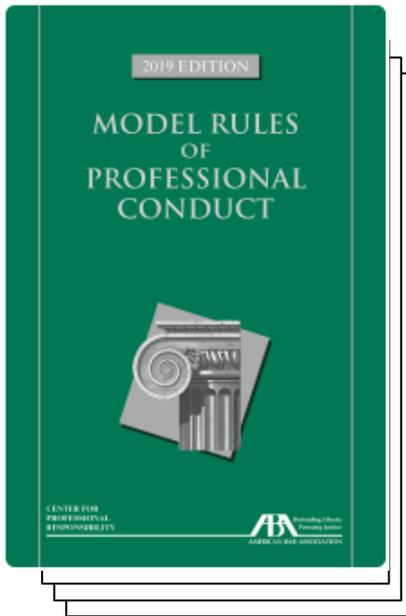
- Follows the ABA Model Rule
- It is professional misconduct for a lawyer to:
  - (a) violate ... either the Maine Rules of Professional Conduct or the Maine Bar Rules...
  - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

# Hypothetical

You are assisting your client with an employment discrimination claim based on sexual harassment where your client is seeking back wages, medical expenses, and future earnings. The matter goes to mediation and does not settle, but the parties agree to reconvene a month later, after the you provide additional information showing your client's efforts to obtain other employment. The day before the mediation is scheduled to reconvene, the other side's counsel offers an extra \$20,000 to settle the claim, specifically mentioning future wages as the reason behind the new offer. You call your client to share the good news. After hearing about the offer, the client shares her own good news: she has accepted a new position paying \$15,000 a year more than her prior job. Suddenly recognizing that her new employment could affect the settlement offer, your client says, "Just take the deal, and don't say a word about my new job." Do you:

- a. Say nothing about your client's new position and accept the offer;
- b. Call opposing counsel and let them know about your client's new position and pay; or
- c. Stay silent but invent a reason to delay signature to give the other side time to discover this new fact.

# Rule 1.13: Organization as Client



*A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.*

*(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law*

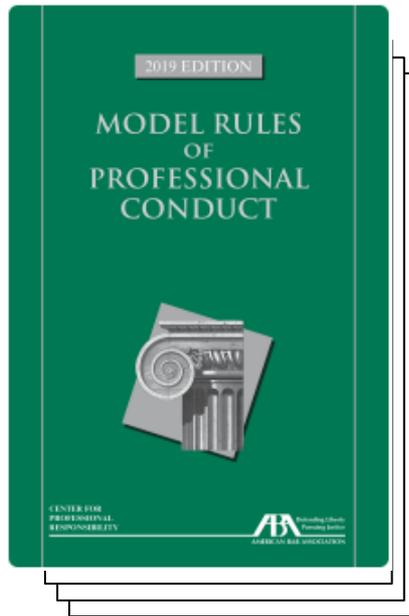
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# Hypothetical

- As in house counsel for a large consulting organization, you manage most vendor contracts in the technology space. The organization is changing one of its critical platforms but it is going to take at least a year to switch. You will negotiate an agreement with the new provider and a transition Statement of Work with the existing provider. The business lead for this tells you that he does not want the existing provider to know that this is a transition SOW and the new provider to know that they are the incumbent, but that winning the work hinges on how beneficial the deal is to the company. Your message to the business lead is:
  - a. This is a critical platform and the enterprise needs continual service and a smooth transition – we are not playing games with this negotiation
  - b. OK – I am ready for this game of poker.
  - c. Let's get our respective managers involved in this dialogue to determine the best strategy for these negotiations.

## ABA Model Rule 1.6: Confidentiality of Information



*“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”*

# ABA Model Rule 1.6: Confidentiality of Information

- **Comment 2: Client-Lawyer Relationship**
  - A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation...
  - This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.
  - The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

# Maine Rule 1.6: Confidentiality of Information

- (a) A lawyer shall not reveal a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b)
- (b) b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain substantial bodily harm or death;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's professional obligations;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (6) in connection with the sale of a law practice under Rule 1.17A or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction; or
  - (7) to comply with other law or a court order.
- (c) Before revealing information under paragraph (b) (1), (2), or (3), the lawyer must, if feasible, make a good-faith effort to counsel the client to prevent the harm and advise the client of the lawyer's ability to reveal information and the consequences thereof. Before revealing information under paragraph (b)(5) or (6), in controversies in which the client is not a complainant or a party, the lawyer must, if feasible, make a good faith effort to provide the client with reasonable notice of the intended disclosure.
- (d) As used in Rule 1.6, "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information relating to the representation if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information.

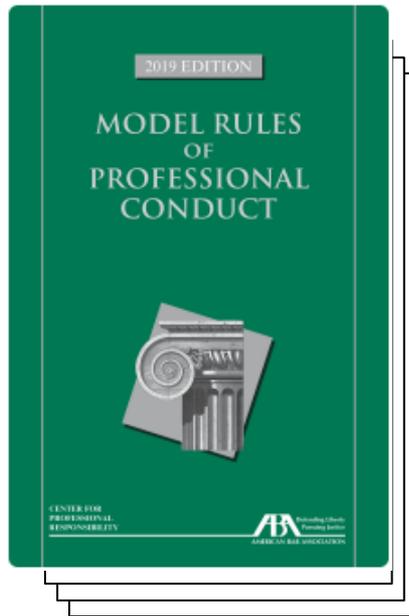
# Maine Ethics Committee Comment

# Hypothetical

Your company, a manufacturing enterprise, owns a large parcel of land near the outskirts of the town where your company is located in south Louisiana. The land was purchased many years ago, and while your company has had vague plans to move its headquarters out of the city to that location, it has never taken any action. A couple of months ago, you learned that a new development project has been approved that will place a lock system across the river that flows through the town. This will protect the town from flooding due to hurricanes; unfortunately, the land your company owns is on the wrong side of the lock and will likely suffer a significantly higher degree of flooding, making it largely unusable for your planned purposes. A large conglomerate from out of state approached your company a couple of weeks ago to inquire as to the potential purchase of the property, and your company indicated your company's willingness to sell. The conglomerate's attorney called you to discuss the transaction. During the conversation, the attorney asks, "Why does your company want to sell the property?" Which of the following comes closest to how you would respond?

- a. "You know, we aren't that willing to sell and would only do so for the right price."
- b. "We are worried about the potential flooding impacts of a recently finalized lock project."
- c. "We are planning to build our company's headquarters there, and it would take a lot for us to part with this property."

# Rule 4.4: Respect for Rights of Third Persons



*“(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and **knows or reasonably should know** that the document or **electronically stored information** was inadvertently sent shall **promptly notify the sender.**”*

# Maine Rule 4.4: Respect for Rights of Third Persons

(b) A lawyer who receives a writing and has reasonable cause to believe the writing may have been inadvertently disclosed and contain confidential information or be subject to a claim of privilege or of protection as trial preparation material:

- (1) shall not read the writing or, if he or she has begun to do so, shall stop reading the writing;
  - (2) shall notify the sender of the receipt of the writing; and
  - (3) shall promptly return, destroy or sequester the specified information and any copies.
- 
- The recipient may not use or disclose the information in the writing until the claim is resolved, formally or informally. The sending or receiving lawyer may promptly present the writing to a tribunal under seal for a determination of the claim.”

# Maine Rule 4.4: Respect for Rights of Third Persons

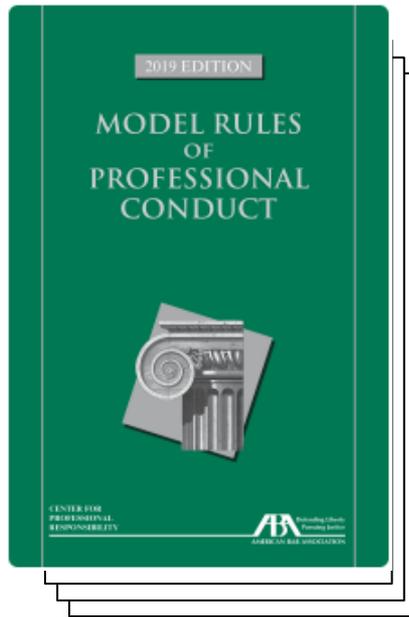
Reporter's notes:

- The version of Rule 4.4(b) recommended by the Task Force places the obligation on the receiving party who realizes the disclosure error to stop reading, to notify the producing party, and to return, destroy or sequester it, pursuant to instructions, or to seal it pending resolution of a claim of privilege or protection. The lawyer is not allowed to make any further use of it unless the claim of protection is resolved to allow such further use...

# Hypothetical

- After a long and contentious negotiation, you have just received the other side's redline and on the first page, you notice that their internal comments and possible changes are in the documents. Your next step is:
  - a. Take a quick peak to see what they are really willing to accept as a liability cap but don't tell anyone else about the mistake.
  - b. Let your business know that we have just had a stroke of luck.
  - c. Return the document to the other side immediately with assurances that no copies have been retained.

# Rule 1.1: Competence



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

# Maine Rule 1.1: Competence

- Follows ABA Model Rule
- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.