

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

AMENDED OPINION NO. 21

A Lawyer's Duty to Consult with a Current or Former Client About the Lawyer's Material Error

A lawyer who commits a material error involving a current client has one or more duties to act under the Minnesota Rules of Professional Conduct. The requirements of Rules 1.4 and 1.7, Minnesota Rules of Professional Conduct (MRPC), are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules. The lawyer must inform a current client of the material error. An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) could reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice.

Since a lawyer's disclosure of a material error to a client may be disruptive to the lawyer-client relationship, the provisions of Rule 1.7, MRPC, dealing with a "concurrent conflict of interest" must be considered to determine whether the personal interest of the lawyer poses a significant risk that the continued representation of the client will be materially limited.¹ Under Rule 1.7, MRPC, the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present.² Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation.³ If so, the lawyer must obtain the client's "informed consent," confirmed in writing, to the continued representation.⁴ Whenever the rules require a client to provide "informed consent," the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent.⁵ In this circumstance, "informed consent" requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.⁶

¹ Rule 1.7(a)(2), MRPC.

² Rule 1.7(a), MRPC.

³ Rule 1.7(b)(1) and (2), MRPC.

⁴ Rule 1.7(b)(4), MRPC.

⁵ Rule 1.4(a)(1), MRPC.

⁶ Rule 1.0(f), MRPC.

Regardless of whether a material error creates a conflict of interest under Rule 1.7, MRPC, the lawyer also has duties of communication with a current client under Rule 1.4, MRPC, that may apply. When the lawyer has committed a material error involving a current client, the lawyer shall inform the client about that conduct to the extent necessary to achieve each of the following objectives:

- 1) keeping the client reasonably informed about the status of the representation,⁷
- 2) permitting the client to make informed decisions regarding the representation,⁸
- 3) assuring reasonable consultation with the client about the means by which the client's objectives are to be accomplished.⁹

All three of these objectives require that a lawyer promptly notify a current client of a material error under Rule 1.4(a), MRPC, even in the absence of apparent harm or prejudice. In disclosing a material error to a current client, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

If a lawyer discovers that he or she has materially erred after the representation has concluded, the lawyer is not required to inform the former client of the error under the Rules of Professional Conduct.¹⁰ Business relations, risk management or general best practice standards may make disclosure of the lawyer's material error to a former client the preferred course of conduct in order for the lawyer to avoid or mitigate potential harm or prejudice to the former client. However, this obligation is not one mandated by the Rules of Professional Conduct.

Comment

The issue of when and what to say to a client; when a lawyer determines a material error has been committed is difficult and may create inherent conflicts. The Board is amending Opinion No. 21 to apprise the Bar of the Board's position on the matter and to conform Opinion 21 with ABA Formal Opinion 481 (April 7, 2018) (lawyer must inform current client of a material error; which is defined as "(a)

⁷ Rule 1.4 (a)(3), MRPC.

⁸ Rule 1.4 (b), MRPC.

⁹ Rule 1.4 (a)(2), MRPC.

¹⁰ See ABA Opinion 481 (April 7, 2018).

reasonably likely to harm or prejudice a client; or (b) of such nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice”).

Adopted: October 2, 2009.

Amended: _____, 2019.

Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board