



WHEN MALPRACTICE IS AN ETHICS ISSUE

BY MARTIN A. COLE

Many lawyers in Minnesota believe that the Director's Office does not discipline lawyers for malpractice, unless the matter involves neglect. Is this true? If it's not entirely true, what are the malpractice-related issues in which the Director's Office will get involved?

Some possible explanations for how the above belief may have come into being: although absolutes are impossible to guarantee, a single mistake by an attorney, even if actionable as malpractice, is highly unlikely to result in professional discipline of the attorney. For example, the Director's Office has for many years routinely dismissed without investigation complaints in which a client is unhappy about the quality of the lawyer's representation — or, as is more often the case, the results achieved — but does not specify any conduct that would violate a Rule of Professional Conduct. In such situations, the director will not even require the attorney to respond. At the other extreme, neglecting a matter for several years such that the applicable statute of limitations expires certainly may constitute malpractice. It can and will just as certainly be considered a disciplinary matter involving neglect.

The first rule in the Rules of Professional Conduct (Rule 1.1) is entitled Competence. The rule requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." An argument can be made that almost all incidents of provable legal malpractice would fail to meet this standard, and thus should be subject to discipline. As indicated, however, this is just not the case. One stated reason for this approach has been to guard the limited resources of the lawyer disciplinary system, a system paid for through attorney registration fees. In 1985, a Supreme Court advisory committee specifically identified this as a reason for not investigating complaints that allege only possible malpractice. It would be inefficient for the Director's Office to retain experts, as often would be necessary, to prove up minor competence allegations. Further, since the disciplinary system cannot provide a financial remedy to the complainants, there would be no judicial economy,

because potential civil litigation would not be avoided.

On occasion, attorneys have been disciplined for violating Rule 1.1, but it generally requires an egregious situation before the Director's Office seeks substantial discipline. For example, one attorney was suspended in part for his failure to know or determine the most basic fact of whether a doctor-patient relationship existed between his client and a doctor before initiating a medical malpractice action.¹ This was not competent representation.

More likely to result in discipline is the situation where an attorney exhibits gross incompetence on a recurring basis such that protection of the public demands action. William Kaszynski was disbarred for such a pattern of incompetence in his representation of immigration clients, an area of law in which Kaszynski in fact had little or no knowledge or experience, and in which he made no apparent effort to acquire competence.² Certainly his conduct also could have been the subject of malpractice actions, at least for those clients who hadn't been deported as a result of his conduct.

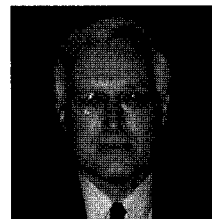
THE RPC IN CIVIL CASES

The Rules of Professional Conduct intertwine with malpractice law in several areas beyond just competence and neglect. The scope section to the Minnesota Rules of Professional Conduct states that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." Minnesota courts also have pronounced that proof of a violation of a professional conduct rule is not sufficient by itself to establish malpractice.³ From these principles, some people have assumed that the disciplinary rules never can play any role in a civil action. This is not true. Courts have applied various Rules of Professional Conduct to issues such as the legal requirements for fee-splitting agreements,⁴ conflict of interest standards for disqualification purposes, or the standard of care in some breach of fiduciary duty cases, such as when an attorney drafts a will or trust in which the attorney is a named beneficiary.⁵

Attorneys subject to a complaint are often concerned whether the fact that they were or were not disciplined is admissible in a subsequent malpractice case. The disciplinary system has no power to control or determine the use of a disciplinary decision by others. First of all, any gag rule that attempted to prevent complainants (or the attorney) from disclosing the result of a complaint likely would be unconstitutional.⁶ Thus, Rule 20, the confidentiality provision of the Rules of Professional Responsibility, does not prevent either participant from attempting to make such use of a disciplinary decision; only the Director's Office and other members of the disciplinary system are prevented from disclosing non-public matters. Ironically, it may be the lawyer who wishes to introduce into evidence the fact that a complaint against the lawyer was dismissed. In either event, such evidence may well be excluded in court as irrelevant or prejudicial.

Conversely, does the result in a civil case have an effect in a subsequent disciplinary prosecution? A malpractice verdict or judgment is not per se proof of a disciplinary violation. Nevertheless, the Director's Office certainly can and does make use of findings from related civil proceedings. For example, sanctions imposed on attorneys may be reported to the director by a court for disciplinary investigation. Due to the likely differences in burdens of persuasion, the findings will not be conclusive. In some instances, such as where a complete contested trial record is available, particularly in cases of fraud or breach of fiduciary duty, the director may offer substantial portions of the record and argue that this same evidence also meets the

MARTIN A. COLE is acting director of the Office of Lawyers Professional Responsibility. He also serves as the assistant director of the Minnesota Client Security Board.



PROFESSIONAL RESPONSIBILITY

higher clear and convincing evidence standard that applies in lawyer discipline cases.⁷

OTHER RELATED ISSUES

There are several other areas in which discipline is regularly imposed that have malpractice aspects to them. For example, attorneys have been publicly disciplined for failing to pay, or make good faith effort to pay, a law-related judgment. This standard applies equally to the payment of a malpractice judgment.⁸ May an attorney file bankruptcy to discharge a malpractice judgment obtained against her? Well, yes, if the attorney is willing to turn her assets over to a bankruptcy trustee and lose her ability to obtain credit for several years. If an attorney has adequate assets to pay a valid judgment, however, and simply refuses to do so, discipline may be imposed.

A malpractice-related standard contained in the Minnesota Rules of Professional Conduct (MRPC) is Rule 1.8(h), which states:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

This rule makes almost all prospective agreements a violation of the disciplinary rule.⁹ Once a malpractice claim has actually been made (even before a formal action has been commenced), however, a lawyer may resolve it subject to some restrictions if the claimant is unrepresented.

In another area where malpractice and professional responsibility overlap, the American Bar Association's Standing Committee on Client Protection this year requested the ABA to amend its Model Rules of Professional Conduct to require attorneys to inform all first-time clients whether the attorney maintains malpractice insurance. The failure to so inform would constitute a violation of the attorney's duty to communicate under Rule 1.4 of the Model Rules. Currently, a small number of states, including South Dakota, have rules similar to the proposed Model Rule. Oregon goes further and requires all attorneys to actually have malpractice insurance. Minnesota has neither requirement to date. Although the notification proposal did not pass the ABA

House of Delegates at the ABA convention this year, it likely will resurface in the future.

Nevertheless, under the current Minnesota rules, while an attorney need not affirmatively advise a client concerning their malpractice insurance, if a client directly inquires of an attorney whether he maintains malpractice insurance, the lawyer cannot ethically lie in response. A lawyer was disciplined where the client agreed to remain with the lawyer after having made specific inquiry about the lawyer's insurance in connection with a potential claim. Although the lawyer truthfully answered at the time that he maintained malpractice insurance, he then failed to notify the insurer of the potential claim and allowed the insurance to lapse without informing the client.¹⁰

CONCLUSION

In the majority of situations involving potential malpractice actions, the lawyer disciplinary system will play little or no role, and may not even have any knowledge of the conduct or the claim. There is an overlap in some circumstances, however, where actionable conduct also is a disciplinary offense. Situations on the extreme end of the spectrum are easy to determine, but in many cases the distinction may be quite fine. □

NOTES

1. In re Geiger, 621 N.W.2d 16 (Minn. 2001).
2. In re Kaszynski, 620 N.W.2d 708 (Minn. 2001).
3. Carlson v. Fredrikson & Byron, 475 N.W.2d 882 (Minn. App. 1991).
4. Christensen v. Eggen, 577 N.W.2d 221 (Minn. 1998).
5. Buysse v. Bauman-Furrie & Co., 448 N.W.2d 865 (Minn. 1989); Matter of the Trust Created by Harlan D. Boss, 487 N.W.2d 256 (Minn. App. 1992).
6. See e.g. Doe v. Gonzalez, 723 F.Supp. 690 (S.D. Fla. 1988).
7. See In re Vitko, 519 N.W.2d 206 (Minn. 1994); In re Shinnick, 552 N.W.2d 212 (Minn. 1996).
8. In re Ruffenach, 486 N.W.2d 387 (Minn. 1992); In re Brehmer, 642 N.W.2d 431 (Minn. 2002).
9. See e.g. In re Weiblen, 439 N.W.2d 7 (Minn. 1989). *The Restatement (Third) of the Law Governing Lawyers §54 eliminates the "unless permitted ... and the client is independently represented" language, and pronounces all such agreements to be both unenforceable and subject to discipline.*
10. In re Richard Meshbesh, 487 N.W.2d 230 (Minn. 1992).

Legal Professional Liability Coverage for America's Greatest Law Firms

Financial Stability
Strong Leadership
Dependable Service
Optional Monthly Payment Plan

Contact:
Matt Yegge
Professional Liability Division
800-299-4331


GREATAMERICAN.
INSURANCE GROUP



www.greatamericanlawyer.com