

Disclosing errors

Everyone makes mistakes. Law is a challenging field, and the stakes are often high for our clients. It has long been the position of the Lawyers Professional Responsibility Board that lawyers have an ethical duty to their clients to disclose errors that may provide a reasonable basis for a non-frivolous malpractice claim.¹ The American Bar Association has provided additional guidance on this topic. ABA Formal Opinion 481, issued last year, provides:

[Rule] 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the [rules] to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.²

Basis of this obligation

This obligation arises from our fundamental duty to communicate with our clients. Rule 1.4, Minnesota Rules of Professional Conduct, mirrors the ABA Model Rule, and sets forth our communication obligations. As a refresher, lawyers must "promptly inform" clients of any "decision or circumstance" where the client's informed consent is required.³ We must "reasonably consult with the client about the means by which the client's objectives are to be accomplished."⁴ We must "keep the client reasonably informed about the status of" her matter, and must "promptly comply with reasonable requests for information."⁵ We must also consult with the client about any limitation imposed by the ethics rules on our ability to assist the client, and, importantly, we must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁶ Given the breadth of our communication obligation with our clients—particularly the requirement that we must explain matters such that clients can make informed decisions about their case—it is unsurprising that we have an ethical obligation to report to our client a material error.⁷



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What is material?

When the Lawyers Board reviewed this subject in 2009, the board focused on "a non-frivolous malpractice claim" as the event triggering the disclosure obligation. In doing so, the board focused in part on Rule 1.7, concurrent conflicts of interest. Certainly it is true that the possibility of a malpractice claim presents a potential concurrent conflict of interest if the lawyer is concerned about avoiding liability such that it may materially limit the representation of that client.⁸ The recent ABA opinion posits, however, that "it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice."⁹ I agree, and the Lawyers Board is proposing to amend Opinion No. 21 to bring it into line with ABA Opinion 481.

As the opinion notes, errors occur on a continuum. For purposes of your disclosure obligation, if the error is material, you have a duty to inform a current client. As noted above, an error is material if a disinterested lawyer would conclude that it is reasonably likely to harm or prejudice the client or of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. Errors on the ends of the continuum are generally easy to discern (missing the statute of limitations, for example—disclosure obligation; missing a non-substantive deadline that causes no issues—no disclosure obligation), but between the two ends, each matter will need to be reviewed on a case-by-case basis from an objective perspective. Remember, too, that your disclosure must be "prompt" under the circumstances, which again will be a fact-specific inquiry.

What about former clients?

Because this duty springs from Rule 1.4, which is limited to current clients, the ABA Opinion limits its application to current clients. Accordingly, if you discover a material error after the representation has concluded, you do not have an ethical obligation to communicate that material error to your former client. There may be reasons, for risk management purposes or otherwise, that might counsel toward disclosure to a former client (such as the ability to mitigate harm), but that would be a matter of choice, not ethics, for the lawyer. Practitioners may also wish to review ABA Opinion 481 for its discussion of when a current client becomes a former client for additional guidance.

Obligation to self-report to the Lawyers Board?

One of the most persistent myths I have encountered as Director is the wide-spread belief that we have an ethical duty to report our own misconduct to the Lawyers Board. There is no duty to self-report ethical violations, whether it is your commission of a material error while handling a matter or otherwise. You do have an ethical duty to report the misconduct of another lawyer if you know that a lawyer has

committed a rule violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.¹⁰ While there may be reasons you may wish to self-report an ethical violation, you do not have an ethical duty to do so.

Conclusion

The Lawyers Board has issued an amended draft of Opinion No. 21 on its website to bring it into conformity with ABA Opinion 481.¹¹ You may comment on the proposed amendment through August 16, 2019, by sending an email to me at susan.humiston@courts.state.mn.us, or writing to the board c/o Office of Lawyers Professional Responsibility, 1500 Landmark Tower, 345 St. Peter St., St. Paul, MN 55102. The board will vote on the proposed amended Opinion No. 21 at its quarterly meeting on September 27, 2019. If you have a question as to whether you have an ethical duty to disclose an error in a particular circumstance, you can call the ethics hotline at 651-296-3952 or 1-800-657-3601. ▲

Notes

¹ Lawyers Board Opinion No. 21 (2009).

² ABA Formal Opinion 481 (4/17/2018).

³ Rule 1.4(a)(1), Minnesota Rules of Professional Conduct (MRPC).

⁴ Rule 1.4(a)(2), MRPC.

⁵ Rule 1.4(a)(3), MRPC; Rule 1.4(a)(4).

⁶ Rule 1.4(a)(5), MRPC; Rule 1.4(b), MRPC.

⁷ "The 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." Rule 1.4, Comment [5].

⁸ Rule 1.7(a)(2), MRPC, defining a "concurrent conflict" to include "a significant risk that the representation of one or more clients will be materially limited... by a personal interest of the lawyer."

⁹ ABA Formal Opinion 481 at 4.

¹⁰ Rule 8.3(a), MRPC.

¹¹ www.lprb.mncourts.gov/rules/pages/pendingrules.