

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Proposed Opinion No. 21 –

A Lawyer's Duty to Consult with a Client About the Lawyer's Own Malpractice

A lawyer who knows that the lawyer's conduct could reasonably be expected to be the basis for a malpractice claim by a current client should consult with the client about the lawyer's conduct and the potential claim. In consulting with the client, the lawyer should disclose any significant risk that continued representation of the client will be materially limited by the personal interest of the lawyer and should advise the client to seek independent legal advice about the potential claim and the lawyer's continued representation. When there is a conflict of interest, the lawyer should obtain the client's informed consent, confirmed in writing, regarding the lawyer's continued representation, if the continued representation is not otherwise prohibited.

Comment

The issue of when and what to say to a client when a lawyer knows that the lawyer's conduct could reasonably be expected to be the basis for a malpractice claim is difficult and creates inherent conflicts. The Board is issuing Opinion No. 21 to apprise the Bar of the Board's position on the matter and to provide guidance to lawyers who may confront the issue. The Board is not creating new Rules of Professional Conduct, and Opinion No. 21 does not exceed the scope or plain meaning of the Minnesota Rules of Professional Conduct (MRPC). Opinion No. 21 draws from and is based upon defined terms in Rules 1.0(b), (c), (f), (g), (i), and (o), MRPC, and obligations set forth in Rules 1.4, 1.7, 1.8, and 4.3, MRPC. For example, Rule 1.4(a)(3), MRPC, requires a lawyer to "keep the client reasonably informed about the status of the matter"; and Rule 1.4(b), MRPC, requires a lawyer to "explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation."

A lawyer's duty to disclose to the client conduct which may constitute malpractice is well-recognized. *See, e.g., Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666, 673 (Cal. 2007) ("Attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice."); *In re Hoffman*, 700 N.E.2d 1138 (Ind. 1998) (attorney disciplined for failing to explain adequately to client the effect of attorney's malpractice); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) ("[A]n attorney who realizes he or she has made a mistake must immediately notify the client of the mistake as well as the client's right to obtain new counsel and sue the attorney for negligence."); *abrogated on other grounds by Olds v. Donnelly*, 696 A.2d 633 (N.J. 1997); *Tallon v. Comm. on Prof'l Standards*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ("When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client."); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ("[A]n attorney is obligated to inform his

or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.”); N.Y. St. B. Ass’n Comm. on Prof’l Ethics, Op. 734 (2000), 2000 WL 33347720 (Generally, an attorney “has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.”); N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, Op. 684 (“The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney’s own interest.”); *Restatement (Third) of the Law Governing Lawyers* § 20 cmt. c (1998) (“If the lawyer’s conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client.”).

“The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client [I]f the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” Rule 1.7, MRPC, cmt. 10. This principle applies to the lawyer’s entire firm, such that if one lawyer in the firm is precluded from representing the client because of the adverse effect, then all lawyers in the firm are precluded. *See* Rule 1.10(a), MRPC.

When a lawyer consults with the client about the lawyer’s possible malpractice, the lawyer is in a real sense engaged in a conversation with an unrepresented person because, with respect to that potential malpractice claim, the client is unrepresented. Accordingly, the lawyer’s consultation on the matter in question is governed by Rule 4.3(a), MRPC, which provides that “a lawyer shall not state or imply that the lawyer is disinterested,” and Rule 4.3(d), MRPC, whose language is tracked in Opinion No. 21. Rule 4.3(d), MRPC, provides that “a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.” In the case at hand, it is the interest of the lawyer which may be in conflict with the client’s interest. *See* Rule 1.7(a)(2), MRPC (“A concurrent conflict of interest exists . . . if there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”). A lawyer’s obvious self-interest in avoiding a malpractice claim or in limiting its impact on the lawyer is a personal interest of the lawyer which gives rise to a potential concurrent conflict of interest.

There may be a number of reasons why a client may wish to continue representation with a lawyer whose conduct could reasonably be expected to be the basis of a malpractice claim. In such cases, the lawyer should obtain the client’s informed consent, confirmed in writing, for continued representation of the client regarding the matter in question. *See* Rule 1.7(b)(4), MRPC (a lawyer who has a concurrent conflict of interest may continue to represent an affected client if the client gives informed consent, confirmed in writing, assuming no other prohibitions under the MRPC).

It may be argued that a lawyer need not disclose to a client conduct which the lawyer knows could reasonably be expected to be the basis for a malpractice claim so long as the lawyer determines there is not a significant risk the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interest in avoiding malpractice liability.

Given the fiduciary obligations that attend the attorney-client relationship and the lawyer's obligations under Rule 1.4, MRPC, to keep the client informed, that is a decision which the lawyer should not unilaterally and subjectively make on his or her own. "It is the undoubted duty of an attorney to communicate to his client whatever information he obtains that may affect the interests of his client in respect to the matters entrusted to him." *STAR Centers, Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 77 (Minn. 2002) (quoting *Selover v. Hedwall*, 184 N.W. 180, 181 (Minn. 1921)). See *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982). If the lawyer is to move forward on a client's behalf and, at the same time, on the lawyer's own behalf to protect the lawyer's malpractice exposure, the decision to do so should be jointly that of the lawyer and client, after informed consent confirmed in writing.

A trilogy of opinions by a U.S. Bankruptcy Court (*In re SRC Holding Corp.*, 352 B.R. 103 (Bankr. D. Minn. 2006)), a U.S. District Court (*In re SRC Holding Corp.*, 364 B.R. 1 (D. Minn. 2007)), and the U.S. Court of Appeals for the Eighth Circuit (*Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009)) reflect conflicting views on matters which are the subject of Opinion No. 21; but Opinion No. 21 is not opining on that litigation. A lawyer's obligation to report a possible malpractice claim to the lawyer's client also is discussed in a local article written by Charles E. Lundberg, entitled *Self-Reporting Malpractice or Ethics Problems*, 60 Bench & B. of Minn. 8, Sept. 2003, and more recently and extensively in Brian Pollock's article, *Surviving a Screwup*, 34 ABA Litig. Mag. 2, Winter 2008, and Benjamin P. Cooper's article, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174 (2009).

A lawyer faced with the issue of consulting with a client about the lawyer's own malpractice should bear in mind three related issues. Concealment or failure to disclose one's own malpractice to a client may: 1) place the lawyer at risk of forfeiting fees or being subjected to a separate malpractice claim by the client; see, e.g., Cooper, *supra* at 33-37 (collecting cases); 2) result in tolling the statute of limitations for a malpractice claim against the attorney; see, e.g., *Anoka Orthopaedic Assoc., PA v. Mutschler*, 773 F. Supp. 158, 169-70 (D. Minn. 1991); 3) Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 23:14 (2009 ed.); and/or 3) result in the lawyer losing the attorney-client privilege which may otherwise attach to communications by the lawyer with another lawyer about the malpractice claim. See, e.g., *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002); *Koen Book Distrib., Inc. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., et al.*, 212 F.R.D. 283 (E.D. Pa. 2002). See also Order, *Lindquist & Vennum, PLLP v. Speciale*, Civ. 05-597 (D. Minn. Nov. 14, 2006) (recognizing but distinguishing such cases); *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866 (Wash. Ct. App. 2005).