

OPINION NO. 21A 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 the basis for a non-frivolous malpractice claim by a current client that materially affects the client's interests has one or more duties to act under the Minnesota Rules of Professional Conduct. The requirements of Rules 1.4 and 1.7 are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules, with particular attention to Rules 1.4 and 1.7.

Since the possibility of a malpractice claim that arises during representation may cause a lawyer to be concerned with the prospect of legal liability for the malpractice, the provisions of Rule 1.7 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 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

Regardless of whether the possibility of a malpractice claim creates a conflict of interest under Rule 1.7, the lawyer also has duties of communication with the client under Rule 1.4 that may apply. When the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's interests, 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

Adopted: October 2, 2009.

¹ Rule 1.7(a)(2).

² Rule 1.7(a)

³ Rule 1.7(b)(1) and (2).

⁴ Rule 1.7(b)(4).

⁵ Rule 1.4(a)(1).

⁶ Rule 1.0(f).

⁷ Rule 1.4(a)(3).

⁸ Rule 1.4(b).

⁹ Rule 1.4(a)(2).

Comment

The issue of when and what to say to a client when a lawyer knows that the lawyer's conduct described in Opinion 21 could reasonably be expected to be the basis for a malpractice claim is difficult and may create 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.

In consulting with the current client about the possible malpractice claim, 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."

Other jurisdictions have recognized a lawyer's ethical duty to disclose to the client conduct which may constitute malpractice. See, e.g., 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.").

In re SRC Holding Corp., 352 B.R. 103 (Bankr. D. Minn. 2006), *aff'd in part and rev'd in part In re SRC Holding Corp.*, 364 B.R. 1 (D. Minn. 2007), reversed *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009) discuss certain matters addressed in Opinion 21. In *Leonard*, the Eighth Circuit held that the bankruptcy court had relied too heavily on ethics rules in determining whether the law firm had violated a legal duty to consult with its client about the law firm's possible malpractice. The Eighth Circuit said "[d]emonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached." 553 F.3d 628. In predicting how the Minnesota Supreme Court would rule on an attorney's legal duty to consult with a client about the law firm's possible malpractice, the Eighth Circuit did not opine on a law firm's ethical duties to consult about such a claim. Recognizing the distinction, this Opinion does not opine on a law firm's legal duties to consult about such a claim.

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 Benjamin P. Cooper's article, The Lawyer's Duty to Inform His Client of His Own Malpractice, 61 Baylor L. Rev. 174 (2009) and Brian Pollock's article, Surviving a Screwup, 34 ABA Litig. Mag. 2, Winter 2008.