When Lawyers Make Mistakes

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1. Introduction

Everyone makes mistakes, and that includes lawyers. The root cause of each mistake no doubt varies, but might include pressure to provide services at reasonable costs, the growing use of technology (including generative artificial intelligence, such as ChatGPT), and the rush of practice.

A client, or former client, who learns of a mistake may, of course, contact the lawyer or retain another counsel to file a grievance, assert a malpractice claim, or take other action. This article addresses the distinct fact pattern: the lawyer learns of a mistake before the client raises the issue with the lawyer. Obviously, at that point, the lawyer's interest may be in keeping silent, but the matter may not be concluded, or the lawyer may be continuing to represent the client in another matter; or, there may be past damage caused by the mistake, or potential future damage that can be avoided. And, the lawyer may no longer represent the client, meaning, for example, the lawyer may be unaware of any potential risk of harm to the former client.

Significantly, as used in this article "mistake" means "mistake," and not active fraud on a client or intentionally concealing a mistake from a client – "covering up" what had been a mistake. In other words, this addresses when a lawyer inadvertently did an act or engaged in an omission and then discovered it later and does not seek to hide the mistake. Hiding a mistake can constitute fraud, such as the kind of fraudulent concealment necessary to toll the running of the statute of limitations. *E.g., Nichols v. Swindoll,* 2023 Ark. 146 (Ark. 2023).

2. The Potential Sources of a Duty to Disclose a Mistake to a Current Client and What Triggers the Duty

Lawyers owe clients duties of care, which take several forms, and duties of loyalty, which are usually referred to as "fiduciary" duties. The failure to disclose a mistake can implicate one or both forms of duty, and which is implicated can affect the statute of limitations, damages, and other issues. *See Leonard v. Dorsey & Whitney LLP,* 553 F.3d 609, 628-29 (8th Cir. 2009); *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,* 939 N.W.2d 32 (S.D. 2020). In addition, and most pertinent here, the "trigger" for when disclosure is required may turn on the source of the duty.

For those reason, this section analyzes the sources of duties separately. However, many jurisdictions do not clearly distinguish between the two theories, and, of course, in others there is no authority at all. By way of example, in *RFF Family Partnership, LP v. Burns & Levinson, LLP,* 30 Mass. L. Rptr. 502 (Mass. Sup. Ct. 2012), the court discussed the failure to disclose a mistake both in terms of the duty of competency and fiduciary duty.

Finally, because the duty of care and a fiduciary duty are owed only to *current* clients, the authorities have held that a lawyer does not owe a duty to former clients to disclose mistakes. This is an important limitation on the duty of disclosure of mistakes.[1]

However, the determination of when an attorney-client relationship has ended is fact- and jurisdiction specific, but the American Bar Association provided this general summary of the various approaches and fact patterns:

> Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded. Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter); (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation; [FN18] or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the relationship has ended. If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.
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> Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other. In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation. In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.,* suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.
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> For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter. With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise. In the third category, where a

[1] *See* Am. B. Ass'n. Formal Eth. Op. 18-481 (2018).

lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation. If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded. Whether an episodic client is a current or former client will thus depend on the facts of the case.

The American Bar Association gave this example of when a lawyer who had represented a client but then identified a mistake would have no duty:

> [A]ssume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

ABA Formal Op. 18-481.

A. Disclosure of a Mistake may be Required Because of the Duty of Care and Communication

There are several legal principles that may require disclosure of a mistake. Some of them, discussed here first, are found in disciplinary rules. Violation of a disciplinary rule can, of course, result in discipline. *See Tallon v. Comm. On Prof'l Standards,* 446 N.Y.S.2d 50 (N.Y. App. Div. 1982) (attorney who failed to inform client he had missed statute of limitations had 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.").

While violation does not generally give rise to a claim, violation of an applicable disciplinary rule can serve as evidence of breach of duty or in some states serve as a basis for negligence *per se. See Leonard v. Dorsey & Whitney LLP,* 553 F.3d 609, 628-29 (8th Cir. 2009); *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,* 939 N.W.2d 32 (S.D. 2020);

Universal Mfg. Co. v. Gardner, Carton & Douglas, 207 F.Supp.2d 830 (N.D. Ill. 2002); *Tucker v. Rogers,* 334 Ga. App. 58, 778 S.E.2d 795 (2015).

Model Rule 1.4 and most state rules require attorneys keep clients "reasonably informed about the status of a matter." *See, e.g.,* Am. B. Ass'n. Formal Comm. Prof'l Responsibility Formal Op. 481 (2018) ("A Lawyer's Duty to Inform a Current of Former Client of the Lawyer's Material Error"); *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,* 939 N.W.2d 32 (S.D. 2020). Many bar opinions and cases address the duty to disclose mistakes in terms of the duty of communication in Rule 1.4.[2]

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[2] The ABA Opinion cited these authorities broken down by the type of dispute at issue:

- For malpractice and breach of fiduciary decisions, *see, e.g., Leonard v. Dorsey & Whitney LLP,* 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); *Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); *RFF Family P'ship, LP v. Burns & Levinson, LP*, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re Tallon*, 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.").
- For disciplinary decisions, *see, e.g., Fla. Bar v. Morse*, 587 So. 2d 1120, 1120-21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C.*, 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").
- For ethics opinions, *see, e.g., Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178*, 2009 WL 3270875, at *4 (2009) ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a "significant development."DD' (citation omitted)); *Colo. Bar Ass'n, Ethics Comm.*, Formal Op. 113, at 3 (2005) ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); *Minn. Lawyers Prof'l Responsibility Bd. Op. 21*, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous

A lawyer may be disciplined even if the client is not harmed. *See In re Shaughnessy,* 442 Mass. 1012, 811 N.E.2d 990 (2004). Lawyers have been disciplined for failing to inform a client of a mistake, or their bar associations have indicated that discipline is appropriate under that circumstance.[3]

In the malpractice context, courts have reasoned that a lawyer who knows of a mistake that could reasonably be expected to be the basis of a legal malpractice claim has a duty to advise the client because imposing such a duty "serves the purpose of ensuring that a client is able to make an informed decision about how best to proceed under such circumstances." *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,* 939 N.W.2d 32 (S.D. 2020). Put simply, the client cannot make an informed decision on whether to continue to use the lawyer's service without knowing of the malpractice claim. *Id.*

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malpractice claim by a current client that materially affects the client's interests"); *2015 N.C. State Bar Formal Op.* 4, 2015 WL 5927498, at *2 (2015) (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; *N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684,* 1998 WL 35985928, at *1 (1998) (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); *N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734,* 2000 WL 33347720, at *3 (2000) (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); *Sup. Ct. of Prof'l Ethics Comm. Op. 593,* 2010 WL 1026287, at *1 (2010) (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct ""gives the client a substantial malpractice claim against the lawyer").

[3] *See RFF Family Partnership, LP v. Burns & Levinson, LLP,* 30 Mass. L. Rptr. 502 (Mass. Sup. Ct. 2012) (citing Colorado Formal Ethics Op. 113 (November 19, 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"); *In re Ring,* 141 Ill.2d 128, 143 565 N.E.2d 983 (1990) (attorney disciplined in part for failing to inform client of dismissal of her appeal due to his failure to file a brief); *In re Hoffman*, 700 N .E.2d 1138 (Ind.1998) attorney disciplined for failing to explain adequately to client the effect of his malpractice in failing to file claim within limitations period); *Attorney Grievance Comm'n of Md. v. Pennington*, 387 Md. 565, 876 A.2d 642 (2005); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 662 A.2d 509 (1995); *In re Tallon*, 86 A.D.2d 897, 447 N.Y.S.2d 50 (1982); *Columbus Bar Ass'n v. Bowen*, 87 Oh. St.3d 126, 707 N.E.2d 708 (1999); *In re Knappenberger*, 337 Or. 15, 90 P.3d 614 (2004); In re Burtch, 112 Wash.2d 19, 770 P.2d 174 (1989); Wis. Eth. Op. 82–12).

Not every mistake requires disclosure to avoid legal malpractice. The American Bar Association recognized the authorities provide some guidance on what triggers the duty, and provided additional guidance:

> Several state bars have addressed lawyers' duty to disclose errors to clients. For example, in discussing the spectrum of errors that may arise in clients' representations, the North Carolina State Bar observed that material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs. At the other end of the spectrum are nonsubstantive typographical errors or missing a deadline that causes nothing more than delay. Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests. With respect to the middle ground:
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> > Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.
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> Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice. Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among equally viable alternatives. On the other hand, potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute. Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is “material,” which further depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim.

> These opinions provide helpful guidance to lawyers, but they do not-- just as we do not-- purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.
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> In attempting to define the boundaries of this obligation under Model Rule 1.4, 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. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.
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> With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. 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.

Am. B. Ass'n. Formal Eth. Op. 18-481 (2018) (footnotes and quotation marks omitted).

In most states, however, a legal malpractice claim requires damage. Thus, if the client has sustained harm sufficient to satisfy the damage element of a legal malpractice claim, then disclosure is required. *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,* 939 N.W.2d 32 (S.D. 2020). In addition, some courts hold that a duty arises "when the client has already sustained actual injury, or the likelihood of injury is readily apparent." *Id.*

B. Disclosure of a Mistake may be Required Because of the Duty of Loyalty or a Lawyer's Fiduciary Duty to a Client

As one court noted, the "confession of error runs contrary to self-interest and human nature, yet may be required" because it is "simply a fact of fiduciary life." *RFF Family Partnership, LP v. Burns & Levinson, LLP,* 30 Mass. L. Rptr. 502 (Mass. Sup. Ct. 2012).

When a fiduciary duty is the source of a duty to disclose a mistake, it is required when failure to disclose creates a conflict of interest that "may require the lawyer to withdraw." *Leonard v. Dorsey & Whitney LLP,* 553 F.3d 609, 628-29 (8th Cir. 2009). This conflict arises if the lawyer is materially limited in his ability to continue to represent the client. Disclosure is required "if the failure to do so could reasonably be expected to prejudice the client's continued representation." *Leonard v. Dorsey & Whitney LLP,* 553 F.3d 609, 628-29 (8th Cir. 2009). *See*

Am. Zurich Ins. Co. v. Palmer, 529 F. Supp. 3d 1023 (D.S.D. 2021) (predicting South Dakota would recognize a duty to disclose a mistake as part of the fiduciary duty lawyers owe clients). As the American Bar Association stated:

> An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that 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." Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest.

Am. B. Ass'n. Formal Op. 18-481.

The *Leonard* case illustrates this requirement and how it limits malpractice liability for failing to disclose a mistake:

> In *Leonard*, the Eighth Circuit considered whether a former client could pursue a cause of action against his former lawyer for breach of fiduciary duty based on the attorney's failure to disclose a possible malpractice claim. There, the Dorsey law firm represented M&S, an investment bank who sought to lend money to President, a management company that operated an Indian casino. Dorsey failed to get approval from the National Indian Gaming Commission (NIGC) before M&S closed on the loan with President. Id. Before closing, Dorsey internally debated and ultimately believed that the documents needed NIGC approval in order to be enforceable, but Dorsey did not disclose this belief to M&S. In fact, Dorsey represented to M&S that NIGC approval was not needed. Id. M&S and President closed the loan without NIGC approval.
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> One year later, after President defaulted on the loan, President asserted that the loan was not enforceable because the loan documents lacked NIGC approval. Dorsey then brought a lawsuit on behalf of M&S against President to recover the unpaid loan amounts. Id. Later, M&S's bankruptcy trustee brought a lawsuit against Dorsey for breach of fiduciary duty alleging that Dorsey had failed to disclose its acts of potential malpractice to M&S.
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> The Eighth Circuit sitting in diversity predicted that the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client. When the lawyer's interest in nondisclosure conflicts with the client's interest in the representation, then a fiduciary duty of disclosure is implicated. In order to hold the attorney liable under a duty to disclose, the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected

by' his own interest in avoiding malpractice liability. But a lawyer may act in the client's interests to prevent an error in judgment from harming the client without breaching a fiduciary duty.

Under that standard, the Eighth Circuit found that Dorsey did not breach its fiduciary duty when it represented M&S in the lawsuit against President even though Dorsey had not disclosed the need for NIGC approval. The court found that M&S had failed to establish that it was damaged by the alleged malpractice underlying the fiduciary duty claim. And Dorsey's representation of M&S against President for the unpaid loan amounts was part of its legitimate efforts to prevent its possible error in judgment from harming M&S. Because there was not a substantial risk that Dorsey's interests were adverse to those of M&S there was no duty to disclose.

Am. Zurich Ins. Co. v. Palmer, 529 F. Supp. 3d 1023, 1029–30 (D.S.D. 2021) (citations and quotation marks omitted).

Thus, "an attorney can be held liable for breach of fiduciary duty for failure to disclose a possible malpractice claim if the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client." *Am. Zurich Ins. Co. v. Palmer,* 529 F. Supp. 3d 1023, 1029–30 (D.S.D. 2021).

It is important to emphasize that, if the representation is over, it will be unusual for a fiduciary duty to require disclosure of a mistake. Thus, much like a former client is not owed a duty to disclose a mistake under the standard of care, the same should be true with respect to a duty under the fiduciary duty analysis.

D. Disclosure of a Mistake may be Required Because of a Statute or Other Law

Some state statutes may apply to lawyer-client relationships and be implicated by the failure to disclose a mistake. In *RFF Family Partnership, LP v. Burns & Levinson, LLP,* 30 Mass. L. Rptr. 502 (Mass. Sup. Ct. 2012), for example, the court denied a motion to dismiss a claim based on a failure to disclose a mistake made under Massachusetts General Law Chapter 93A, which generally relates to business unfair practices.

In *In re Botimer,* 214 P.3d 133 (Wash. 2009), a lawyer had prepared a tax return for a client, and then realized he had made a mistake on it. An IRS regulation, 31 C.F.R. 10.21, requires lawyers to advise their clients of past mistakes. (As discussed further below, the lawyer went further and advised the IRS of that mistake.)

E. Disclosure of a Mistake may be Required Because of a Duty to the Lawyer's Insurer

In *Minnesota Lawyer Mut. Ins. Co. v. Rasmussen, Nelson & Wonio*, PLC, 15 N.W.3d 791 (Ct. App. Iowa 2024), the Muhrs purchased loans from a bank covering a property worth $2.7 million, which had a perfected first-priority interest in that property, and the law firm represented

them in that transaction. A required continuation of financing statement was not filed, however, and the Muhrs brought that to the Firm's attention. However, the Muhrs told the Firm they would not be making a claim against the Firm; however, that agreement was not reduced to writing.

The Muhrs retained different counsel who foreclosed on the property, the net result being they recovered only $150,000 as a result of having lost first-priority. Then, the Firm renewed its legal malpractice insurance. The required questionnaire required the Firm to disclose any "act, error or omission… which could support or lead to a demand for" damages. The Firm did not list the failure to file the continuation financing statement.

Later, the Muhrs sued the Firm but the insurer denied coverage. The trial court granted the insurer summary judgment, which was affirmed. In part the appellate court reasoned that the Firm should have identified the failure to file the continuation financing document because it was an act, error, or omission that could lead to a claim for damages and was also a "fact or situation which could result in a claim…."

Thus, while not a source of liability, a lawyer may have a contractual duty as a condition of insurance to inform the insurer of known mistakes. The trigger for such duty varies depending on the wording and interpretation of the policy. *See Minnesota Lawyer Mut. Ins. Co. v. Rasmussen, Nelson & Wonio*, PLC, 15 N.W.3d 791 (Ct. App. Iowa 2024). As discussed below, disclosure to an insurer may, itself, be improper to the extent it requires unauthorized disclosure of client confidences. *See* Anthony V. Alfieri, *Law Firm Malpractice Disclosure: Illustrations and Guidelines,* 42 Hofstra L. Rev. 17 (2013).

3. When, How, and to Whom to Make any Required Disclosure

A. When Should Disclosure be Made?

As discussed above, different legal principles may give rise to a duty to disclose. Once triggered, the authorities all generally state that disclosure to the affected client should be made reasonably promptly. *See, e.g.,* Am. B. Ass'n. Formal Op. 18-481 (citing *N.J. Eth. Op. 684*, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); *2015 N.C. Eth. Op. 4*, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); *Tex. Eth. Op. 593*, 2010 WL 1026287, at *1 (requiring disclosure as promptly as reasonably possible"). That opinion amplified on this issue a bit more, stating:

> A lawyer must notify a current client of a material error promptly under the circumstances. Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the

> lawyer's professional liability insurer before informing the client of the material error. Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

Id. (footnotes omitted).

B. How Should Disclosure be Made?

With respect to how to make the disclosure, there are different aspects to consider. First and foremost is whether disclosure should be in writing or made orally. Second, is the content of that communication.

There is no obvious requirement that the disclosure be in writing. Many considerations underlie whether written disclosure is a best practice, however.

As for the content of the communication, the authorities disagree on the specificity of the disclosure. On one end of the spectrum, some authorities require the lawyer to state that the client may have a legal malpractice claim, while others expressly state that all the material facts must be disclosed but the lawyer is *not* required to advise the client that it has a claim against the lawyer.[4] And, of course, the majority of jurisdictions have no definitive answer.

In addition, if the lawyer is continuing to represent the client in the matter in which the mistake occurred, then the lawyer must disclose sufficient information for the client to provide informed consent, either in writing or confirmed in writing, depending on the jurisdiction, to continued representation.

Finally, as the *Minnesota Lawyer Mut. Ins. Co. v. Rasmussen, Nelson & Wonio*, PLC, 15 N.W.3d 791 (Ct. App. Iowa 2024) case illustrates, if the client agrees that it will not assert a claim, it is important to document that agreement. Further, a lawyer settling a legal malpractice claim with an existing client must comply with the applicable version of Model Rule 1.8(h), which provides that a lawyer may not "settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith."

C. To Whom Should Disclosure be Made?

With respect to to whom to make disclosure, it is important to note that if disclosure is required in order to comply with an insurance carrier's requirements, it may be that consent from

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[4] *See* Anthony V. Alfieri, *Law Firm Malpractice Disclosure: Illustrations and Guidelines,* 42 Hofstra L. Rev. 17, 2013).

the client to do so is required. *See* Anthony V. Alfieri, *Law Firm Malpractice Disclosure: Illustrations and Guidelines,* 42 Hofstra L. Rev. 17 (2013).

In *In re Botimer,* 214 P.3d 133 (Wash. 2009), a lawyer had prepared a tax return for a client, and then realized he had made a mistake on it. An IRS regulation, 31 C.F.R. 10.21, requires lawyers to advise their clients of past mistakes. The lawyer went further and disclosed the mistakes to the IRS. As a result, he was disciplined. In affirming those sanctions the Washington Supreme Court rejected his several arguments to avoid it, stating in part "the duty to preserve client confidences outweighs whatever marginal benefit may be gained by reporting past wrongdoings. The crime/fraud exception under former RPC 1.6(b)(1) does not apply to arguably fraudulent tax returns. Finally, Botimer misapprehended his risk of perjury under federal law." *Id*

4. Additional Suggested Best Practices and Issues

The first issue is to assess whether a duty to disclose exists. As should be clear from the above, a lawyer who concludes he has no obligation to inform a client, or former client, of an error risks being unable to rely on insurance coverage.

If a duty to disclose exists, then the question becomes how to proceed. The following are considerations that might bear on a particular set of facts and decision-making.

First, a lawyer who believes she has made a mistake, or uncovered the mistake of another lawyer, should not immediately write down that conclusion but instead should discuss the matter, either with a supervisor or with the lawyer who apparently made the mistake. This is because there may have been no mistake, the client may already know about it, and also because sometimes lawyers use poor word choice in emails. Lawyers often forget the apocryphal saying that emails should be written as if they will be read to a jury.

Second, while disclosure of a mistake need not be in writing, the benefits of a written disclosure are obvious. However, the nature of a specific representation may require the lawyer be careful in phrasing the document. By way of example, a lawyer who makes a mistake in drafting a contract and who believes, as a result, the contract may be unenforceable should consider whether stating "the contract is unenforceable" compared to "a court might find the contract unenforceable." Likewise, while it may not in some jurisdictions be required to advise the client that it may have a malpractice claim, doing so eliminates uncertainty and later disagreements over what was disclosed (and, again, a writing helps avoid those issues as well).[5]

[5] *See generally* Anthony V. Alfieri, *Law Firm Malpractice Disclosure: Illustrations and Guidelines,* 42 Hofstra L. Rev. 17, 2013).

Third, it is important to have clear ending dates for representations. Given that the courts and bar associations are holding that there is no duty to disclose a mistake to a former client, having clarity over the termination or end of a representation is important.

Two other points are related. One is whether a lawyer who learns of another lawyer's mistake has an obligation to report it. The short answer in most states is that if the lawyer who observes the mistake reasonably believes it was merely a mistake, and not intentional, then there is no duty to report.[6]

Finally, the question of what is sufficient to satisfy any required damage element of a legal malpractice claim, and cause-in-fact, in the context of failing to disclose a mistake is an interesting related issue. While, as discussed above, it is black letter law in most states that a legal malpractice claim requires damage, some jurisdictions hold that the mere failure to disclose a mistake is sufficient to constitute damage for this purpose and some states permit recovery of emotional distress damages (and so they, alone, may be sufficient).[7] In addition, it is important for any causation analysis to appreciate that damages must be caused by the failure to disclose the mistake, as opposed to the underlying mistake itself or learning of the mistake itself. *See Gregory & Swapp, PLLC v. Kranendonk,* 2018 UT 36, 424 P.3d 897 (Utah 2018) (underlying mistake, not failure to disclose it, was cause of $2.7 million in mental distress damages).

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[6] *See generally,* Charles Lundberg, Rule 8.3: Reporting Other Lawyers, 21 No. 26 Lawyers J. 8 (2019).

[7] *See Gregory & Swapp, PLLC v. Kranendonk,* 2018 UT 36, 424 P.3d 897 (Utah 2018); *RFF Family P'ship, LP v. Burns & Levinson, LLP*, CIV.A. 12-2234-BLS1, 2012 WL 6062740, at *5 (Mass. Super. Nov. 21, 2012) (citing *Beis v. Bowers*, 649 So.2d 1094, 1097 (La. App. 1995) allowing emotional distress damages for attorney's failure to disclose to client his failure to timely file claim, even though underlying claim was not meritorious); *McAlister v. Slosberg,* 658 A.2d 658 (Me.1995) (similar); *Metcalf v. Waters*, 970 S.W.2d 448 (Tenn.1998) (similar); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179 (Tex.App.2002)).