NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1092 (5/11/2016)

Topic: Duty to Disclose Malpractice of Co-Counsel

Digest: A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim.

Rules: 1.4(a) & (b), 1.7(a), 1.16(b), 8.4(c)

FACTS

1. The inquirer was engaged to represent a client on the eve of trial. The client's prior counsel is serving as co-counsel. In preparing the case, the inquirer has learned that co-counsel conducted virtually no discovery and made no document requests, although the inquirer believes correspondence and emails between the parties could be critical to the case. The inquirer believes this was a significant error or omission that may give rise to a malpractice claim against co-counsel. The outcome of the case, however, has yet to be decided. The inquirer is concerned about disclosing this situation to the client because it would undermine inquirer's relationship with co-counsel, but the inquirer also believes it is in the client's best interests to disclose the facts as soon as possible.

QUESTION

2. Is a lawyer ethically obligated to disclose to a current client the lawyer's belief that a current co-counsel to the client has engaged in a significant error or omission in representing the client?

OPINION

3. Our opinions have consistently held that a lawyer must report to a client a significant error or omission *by the lawyer* in his or her rendition of legal services. *See* N.Y. State 734 (2000), N.Y. State 295 (1973), N.Y. State 275 (1972). *See also* ABA Informal Op. 1010 (1967).

4. Most of these opinions are based on two principles in the former Code of Professional Responsibility – the lawyer's obligation to keep the client fully informed, and the lawyer's obligation to withdraw from representation where the lawyer has a personal conflict of interest. Those two principles are now embodied in Rule 1.4 and Rule 1.7.[1]

---

[1] *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982), a case often cited for the principle that a lawyer must disclose the lawyer's errors and omissions to the client, also cites the predecessor to Rule 8.4(c), which provided that "a lawyer must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." However, in *Tallon*, the lawyer had not only failed to disclose to the client the fact

5. Rule 1.4 governs the ethical obligations of a lawyer regarding communication with the client:

> (a) A lawyer shall (1) promptly inform the client of… (iii) any *material developments* in the matter…; (3) keep the client reasonably informed about the status of the matter; and
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Emphasis added.]

6. Comment [1] to Rule 1.4 reveals the touchstone for the lawyer's obligation: client autonomy in decision-making. Comment [1] says: "Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation." *See also* Comment [3] ("paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation").

7. The second principle reflected in our opinions on the lawyer's own malpractice is whether the significant error or omission results in an inherent conflict between the interest of the client and the lawyer's own interest. In that case, Rule 1.16(b) may require the lawyer to withdraw. Rule 1.7(a)(2) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.[2]

---

that he had let the statute of limitations run on her claim, but also obtained a general release from the client without advising the client of the claim against him. Other courts and ethics committees that have addressed the issue have also based their conclusions on the two principles cited here. *See* the authorities cited in notes accompanying ¶ 10 *infra*.

[2] For a discussion of personal conflicts of interest arising from a lawyer's possible malpractice, *see* Cooper, *infra* n. 6, at 182. *See also* Vincent R. Johnson, *Absolute and Perfect Candor to Clients*, 34 St. Mary's L.J. 737, 773 (2003). When a lawyer confronts the issue whether to disclose his or her own potential malpractice, it gives rise to personal conflict of interest issues under Rule 1.7. *See* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 24:5 (ThomsonWest 2008); *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ill. 1998); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that the client might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests).

8. Although the personal conflict of interest may be more obvious in the case of a lawyer dealing with his or her own malpractice, here there may be a personal conflict concern because the inquirer notes that "exposing counsel's malpractice would undermine our relationship with co-counsel." The inquirer does not state whether the inquirer was brought into the case by the client or by co-counsel, or whether co-counsel has referred matters to the inquirer in the past, or the inquirer expects co-counsel to be a potential source of referrals in the future. The desire to maintain a good relationship with co-counsel would only implicate a personal conflict of interest under Rule 1.7(a) if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected" by the lawyer's financial or personal interests. For example, if the desire for harmony with co-counsel is motivated by the goal of avoiding harm to this client's case, such desire would clearly not be a "personal interest" within the meaning of Rule 1.7(a)(2). That is an issue that the inquirer must determine in the first instance.

9. In N.Y. State 734 (2000), this Committee opined that a lawyer "must report to the client a significant error or omission by the lawyer that may give rise to a possible malpractice claim…." We cited N.Y. State 275 (1972), which said that a lawyer who failed to file a claim within the statute of limitations period "had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages." Opinion 734 also pointed out, however, that not every possible error creates a possible claim for malpractice:

> Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

10. Several bar association ethics opinions have opined that lawyers have an ethical obligation to disclose their own malpractice.[3] Numerous court cases and disciplinary opinions concur.[4] Legal writers have also discussed the obligation.[5] Finally, a lawyer's duty to inform

---

[3] *See, e.g.*, New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 684, 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (March 9, 1998) ("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"); Colo. Bar Ass'n, Ethics Comm. Formal Op. 113 (2005) (concluding that Colorado Rule 1.4 requires a lawyer to tell the client if the lawyer makes an error).

[4] *See, e.g., People v. Greene*, 276 P.3d 94, 99 (Colo. 2011); *Beal Bank v. Arter & Hadden*, 167 P.3d 666, 672 (Cal. 2007) (stating in *dicta* that attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice); *DeLuna v. Burciaga*, 223 Ill.2d 49 (Ill., 2006) (lawyer improperly concealed facts resulting in the running of the statute of

the client of his or her own malpractice is also supported by the Restatement (Third) of The Law Governing Lawyers § 20 cmt. c (2000) (Am. Law Inst. 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," *citing In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982)).

11. The lawyer's obligation to keep the client fully informed under Rule 1.4(a) applies equally to a significant error or omission by co-counsel that may give rise to a malpractice claim. *See Estate of Spencer v. Gavin*, 946 A.2d 1051 (N.J. Super. A.D. 2008). In *Estate of Spencer* the New Jersey court held that a lawyer who did not report co-counsel's theft of client funds could be liable for malpractice. The court in *Estate of Spencer* based its decision in part on New Jersey Rule 1.4(a).

12. As in the case of the lawyer's own malpractice, the inquirer has a duty to inform the client of co-counsel's malpractice if the inquirer concludes that co-counsel's error or omission was significant. It is not clear from the inquiry whether the inquirer has spoken to the co-counsel to determine his or her strategy for the matter (*i.e.*, why co-counsel took "virtually no" discovery and made no document requests). Co-counsel's decision may have been negligent, but it may have been strategic. In any event, determining whether co-counsel's actions indicate a significant error or omission that may give rise to a malpractice claim involves questions of fact and law that are beyond the jurisdiction of this Committee.

---

limitations on the client's malpractice claim against the lawyer, in violation of Illinois Rule 1.4); *Attorney Grievance Comm'n of Maryland v. Pennington*, 387 Md. 565, 876 A.2d 642, 650 (Md. 2005) (lawyer violated Rule 1.4 by failing to disclose a mistake and concealing it); *Olds v. Donnelly*, 150 N.J. 424 (N.J., 1997) (New Jersey Rules of Professional Conduct "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"); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney.

[5] For additional discussion of a lawyer's duty to disclose malpractice, *see* 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 15:22 (2008 ed.); Dolores Dorsainvil, *et al*., *My Bad: Creating a Culture of Owning Up to Lawyer Missteps and Resisting the Temptation to Bury Professional Error*, Report to Annual Conference of the Litigation Section of the American Bar Association, April 16, 2015, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/18_1_my_bad_creating_a_culture_of_owning_up_to_lawyer_missteps.authcheckdam.pdf; Thomas P. McGarry and Thomas P. Sukowicz, *Ethics: Disclosing Malpractice to Clients*, CHICAGO LAWYER, Dec. 2011, *available* at http://www.chicagolawyermagazine.com/Archives/2011/12/McGarry-Sukowicz-Ethics.aspx; David D. Dodge, *Front Eye On Ethics, Owning Up To Your Own Mistakes*, ARIZONA ATTORNEY, 46 Ariz. Att'y 10 (May 2010); Timothy J. Pierce & Sally E. Anderson, *What To Do After Making A Serious Error*, WISCONSIN LAWYER, 83-FEB Wis. Law. 6, 7-8 (February 2010); Brian Pollock, *Second Chance Surviving A Screwup*, 34 No. 2 Litigation 19, 20 (Winter 2008); Charles E. Lundberg, *Self-Reporting Malpractice or Ethics Problems*, 60 Bench & B. Minn. 24 (Sept. 2003); Lazar Emanuel, *Duty to Disclose Error That May Constitute Malpractice*, N.Y. Prof. Resp. Rep. (Feb 1, 2001).

13. If the inquirer determines that co-counsel has engaged in a significant error or omission that may give rise to a malpractice claim, then the lawyer must inform the client. This is particularly so because the client needs the information when the lawyer who has committed the significant error or omission is continuing to represent the client. As one writer has described it:

> Among the most critical decisions that the client has to make regarding the representation in that situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later, and (2) whether to continue the current representation.[6]

14. Here, if co-counsel has committed a significant error or omission that may give rise to a malpractice claim, the client may choose among many options, such as (i) continuing the attorney-client relationship with co-counsel and reserving any possible malpractice claim for later, (ii) terminating co-counsel while keeping the inquirer (or hiring a different lawyer), or (iii) bringing a malpractice action against co-counsel now. The client may want to seek independent advice regarding these options. Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." However, the client can only make an informed choice among those options if the lawyer gives the client the relevant information about co-counsel's past conduct. Accordingly, Rule 1.4(b) requires that the lawyer disclose to the client the facts that the lawyer has learned about co-counsel.

15. The Bar has traditionally been leery of situations where the client seeks to replace one lawyer with another (sometimes referred to as "encroaching on professional employment of other lawyers"). *See* N.Y. State 305 (1973) ("A prospective substitute lawyer should . . . take special care to avoid suspicion that he may be using improper means to have himself substituted for the previously retained attorney. Thus he must not wrongfully or improperly disparage the other lawyer in an endeavor to supplant him ...."); N.Y. State 310 (1973) (lawyer retained to review work of another lawyer must have sufficient information respecting the work being evaluated to give a good faith opinion which will be completely fair to the other lawyer"). The source of this reticence may have been a concern over "solicitation" of employment, which does not apply with the same force to co-counsel whom the client has already employed. Nevertheless, the overriding concern of these opinions is fairness to other lawyers, including co-counsel, so Rule 1.4's concern with the best interests of the client indicates that the inquirer should not report misgivings about co-counsel to the client unless the inquirer reasonably believes co-counsel has committed a significant error or omission that may give rise to a malpractice claim. This standard is lower than the "knowledge" standard that triggers a lawyer's duty under Rule 8.3(a) to report another lawyer's disciplinary violation, but we do not think a lawyer should report co-counsel's shortcomings absent a well-grounded belief that the client needs the information to make

---

[6] Benjamin Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174, 184 (2009), *citing* Frances Patricia Solari, *Malpractice and Ethical Considerations*, 19 N.C. Cent. L.J. 165, 175 (1991).

informed decisions about the representation.

16. In N.Y. State 275 (1972), the error was not only significant, but irremediable, since the statute of limitations had passed. We do not believe the action of co-counsel must be irremediable before the inquirer should report it to the client.

CONCLUSION

17. A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, who is currently co-counsel to the client, has committed a significant error or omission that may give rise to a malpractice claim.

(36-15)