By DANIEL J. SIEGEL

Disclosing Material Errors

Knowing When a Lawyer is Obliged to Notify Clients of Material Errors

While every attorney aspires to never make a mistake, there is a reason what we do is called "practice." We all make mistakes. Fortunately, most are minor, don't impact our clients in any meaningful way and explanations to clients are often unnecessary. But on the other end of the spectrum are mistakes that are so egregious that we must immediately notify our clients and notify our malpractice carriers.

There is a third type of error – a material error – that raises additional questions. An error is "material" if a disinterested lawyer would conclude that it is reasonably likely to harm or prejudice a 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. If an attorney commits a material error, must the attorney notify the client? According to American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 481 ("A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error"), lawyers have an ethical duty to inform current clients of a material error, but they do not have to inform former clients of errors discovered after the attorney-client relationship has ended.

The genesis of this Opinion is Model Rule of Professional Conduct 1.4, which 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, which has a counterpart in Pennsylvania Model Rule of Professional Conduct 1.4.

As explained above, the ABA Opinion defines an error as "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." It further notes that several parts of Rule 1.4(a) may apply when a lawyer may have erred during a current client's representation.

For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter."

Of particular relevance, Model Rule 1.4(a)(4) requires a lawyer to promptly comply with reasonable requests for information. If a client asks about the lawyer's conduct or performance of the representation, he or she must provide truthful answers under this Rule. Finally, Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary

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to permit the client to make informed decisions regarding the representation." As such, under Rule 1.4, a lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.

While the Opinion acknowledges that "[d]etermining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum," it emphasizes that the situation is clear when an error creates a conflict of interest between the lawyer and the client, stating that "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."

To illustrate "the spectrum of errors that may implicate a lawyers' duty of disclosure," the ABA Opinion cites the Colorado Bar Association Ethics Committee's Formal Opinion 113, which 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.'"

The Colorado Opinion noted that errors between these extremes must be analyzed individually and provided these excellent examples:

- Disclosure is not required when the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."
- "[P]otential 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."

The ABA Opinion noted that it would be "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."

"With these considerations in mind," the Committee concluded that a lawyer must promptly inform a current client of a material error committed by the lawyer in the representation, but that whether notification is prompt will be a case-and-fact-specific inquiry. It added that greater urgency is required when a client could be harmed by any delay in notification. Moreover, when reasonable, the lawyer may attempt to correct the error before informing the client.

The inquiry is much easier when a current client becomes former client. Relying on substantive law, the Opinion explained that 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; or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the relationship has ended."

In those circumstances, and because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients, there is no basis for requiring lawyers to disclose material errors to former clients.

Of course, if practice becomes "perfect," then the issue is moot. Until then, lawyers must be aware of their obligations to notify clients about material errors arising during their representation. ■

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