

Self-Reporting Malpractice or Ethics Problems

By Charles E. Lundberg

Do lawyers have either a legal or ethical duty to report themselves upon realizing that they may have committed legal malpractice or violated an ethical rule? Even where blowing the whistle on oneself may not be required as a matter of law or ethics, it may often be a very prudent step to take as a strategic matter.

To whom the lawyer should self-report is a key issue: Should the potential problem be reported to the client? To the malpractice insurance carrier? To the Lawyers Board? To the court? Or to all or none of the above?

This article will summarize the principles underlying lawyer self-reporting and will discuss some practical strategies for deciding whether, when, and how to report errors or omissions that may constitute either malpractice or an ethics violation.

Reporting to the Lawyers Board

Although self-reporting to the Board is not required,¹ it may occasionally be a very prudent strategy. Indeed, lawyers who report their own possible misconduct to the Board before someone else reports it (or is about to) will sometimes get "extra credit" for candor. For example, when an ethics violation is established, but there is a question about the proper sanction, the fact that the lawyer self-reported the violation (and cooperated fully with the disciplinary investigation) can be deemed a mitigating factor and result in a lesser sanction, especially in those situations where the appropriate level of discipline is a close question (e.g., where it's "close to the line" between a private reprimand and a public reprimand, say, or between a public reprimand and suspension).²

On the other hand, if there is no reason to believe that the problem will be reported by someone else, the situation is not unlike reporting one's own criminal behavior to the police. Strategically (and aside from moral considerations, confession being good for the soul, etc.), a lawyer would not

want to self-report.

It should go without saying that a lawyer considering this decision (or any of the self-reporting decisions discussed below) must consult independent counsel. Lawyers in this situation are by definition conflicted; they cannot possibly bring to bear the necessary dispassionate and independent judgment required to decide whether (and how) to self-report.³

Reporting to the Legal Malpractice Carrier

A lawyer considering self-reporting a potential malpractice problem to the client should be very careful not to do or say anything that might prejudice the lawyer's malpractice insurance coverage. Accordingly, it would ordinarily be a good idea to discuss the matter with the malpractice carrier first, since most Minnesota legal malpractice policies affirmatively require the insured lawyer to disclose to the malpractice carrier any facts or circumstances of which the lawyer is aware that may give rise to a malpractice claim. In other words, by the time a lawyer is considering reporting a potential malpractice problem to the client, there is already an arguable legal duty to report it to the malpractice carrier.

But that is not all. In Minnesota, the leading malpractice insurance carriers are ready, willing, and able to assist lawyers in this situation with possible claim repair efforts. A lawyer facing a potential malpractice situation should contact the malpractice carrier immediately and request counsel concerning whether, when, and how to disclose the matter to the client. Most malpractice carriers will consider bringing in outside ethics or malpractice experts to assist in fulfilling the attorney's legal and ethical duties to advise the client in a way that will preserve any defenses to a potential claim.

Reporting to the Client

The duty to report one's potential malpractice to a client is premised both on the Rules and common law.⁴ The common law rule is the same as the ethics rule: the attorney is under a duty to disclose any material matters bearing upon the representation and must impart to the client any information which affects the client's interests.⁵

While there is relatively little case law directly on point -- and none in Minnesota -- the cases from jurisdictions which have addressed the issue have uniformly held that an attorney has a professional duty to promptly notify a current client of the lawyer's failure to act and of a possible claim the client may have against him.⁶

Wholly aside from any legal duty to disclose, lawyers who do not disclose a potential malpractice claim may thereby put themselves in a potential conflict of interest situation, giving rise to an affirmative ethical disclosure

obligation under Rule 1.7 (in the event of a potential conflict between the client's interests and the lawyer's own interests, the lawyer must either withdraw or disclose the matter to the client and advise the client to seek independent counsel).

Moreover, lawyers who do not promptly report potential malpractice claims to the client run the very serious risk of turning a simple (or "vanilla") malpractice claim into a claim for breach of fiduciary duty. Ordinary malpractice claims are relatively easy to deal with. The client bears the burden of proving not only that the lawyer breached a standard of care, but also that the negligence resulted in some actual damage to the client. These can often be formidable hurdles.

But when a simple, vanilla malpractice claim is suddenly transformed into a breach of fiduciary duty claim -- because the lawyer knew of the potential malpractice and purposely did not reveal it, while continuing to represent the client -- it's a whole different ballgame. At a minimum, the right to keep any legal fees earned may be in question. Moreover, hiding malpractice from the client invites a punitive damage claim, and could toll the statute of limitations.⁷

Yet another risk of failing to self-report has recently arisen in the following context: Law firm realizes that it may have committed malpractice, but does not advise the client; instead, it continues to represent the client, while at the same time engaging in confidential self-protective communications (memoranda or email between the partners and the risk management partner, say, discussing the possible claim and steps to take to avoid firm liability, etc.) When the law firm is later sued, are the firm's confidential communications privileged from discovery by the client? Four recent decisions have uniformly held they are not.

Fixing it Yourself

Finally, one important and unresolved issue concerns how significant or substantial -- and how incurable -- a potential error must be before the lawyer must report it to the client. Certainly not every failure to timely answer discovery requests, for example, or every late service of a pleading or other document, necessarily rises to the level requiring disclosure to the client. Relatively insignificant errors, and especially errors that can be promptly cured, arguably do not require disclosure.

On the other hand, lawyers must be very careful not to "shade" the issue in their own favor. Any time there is any question about whether an error can be cured or "fixed," the lawyer should play it safe by erring on the side of disclosure to the client.

Lawyers who practice in the "law of lawyering," advising lawyers about

ethics and malpractice exposure, are quick to point out another dynamic of the self-reporting quandary: a lawyer who makes a prompt and complete disclosure to the client will occasionally find that the client, apparently overwhelmed by the lawyer's candor, refuses to pursue a malpractice claim.

No guarantees here, of course, but a lawyer in this unenviable situation ought not discount the possibility that the client -- especially a client with whom the lawyer has had a good relationship -- would decide not to pursue a claim because the lawyer forthrightly disclosed the error to the client at the earliest possible opportunity.

Again, any lawyer considering any self-reporting would be well-advised to consult independent counsel about these issues before making any decisions. Here as in other areas of the law, the specific facts of the case may change the analysis, and in any event the need for independent judgment before deciding what to do is absolutely crucial.

NOTES

1. See Minn. R. Prof. Cond. 8.3(a) (a lawyer having knowledge that another lawyer has violated the rules shall report to the Lawyers Board if the matter raises a substantial question as to that lawyer's honesty, trustworthiness or fitness).

2. *In re Simonson*, 365 N.W.2d 259 (Minn. 1985); *In re Holly*, 417 N.W.2d 263 (Minn. 1987).

3. See Lundberg, "A Fool for a Client," *Bench & Bar*, December 1991 at p. 22-23, <http://www.bassford.com/fool-client.pdf>

4. See Rule 1.4(a) (lawyer shall keep a client reasonably informed about the status of a matter); Rule 1.7(b) (duty to disclose conflicts between client's interest and lawyer's own interests).

5. *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982).

6. See Restatement (Third) The Law Governing Lawyers, ¶20, cmt. c (since a lawyer must keep a client reasonably informed about all significant developments concerning the matter entrusted to the lawyer, the lawyer's conduct that gives the client a substantial malpractice claim against the lawyer must be disclosed: "For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.")

Where the lawyer does not discover the potential malpractice claim until after the attorney-client relationship has already terminated, the situation may be different. It is not at all clear that a lawyer owes a former client any

duty to disclose potential malpractice. The lawyer would still have a duty to report the potential claim to the malpractice carrier, however.

7. There are different degrees of "hiding" potential malpractice, of course, ranging from a mere failure to immediately disclose a potential problem to actual misrepresentations to the client about the status of a matter. Occasionally, lawyers will go so far as to create fictional "settlements," at their own personal expense, to hide the fact that they have neglected a client's matter. See, e.g., *In Re Iliff*, 487 N.W.2d 234 (Minn. 1992); *In Re Freidson*, 426 N.W.2d 188 (Minn. 1988).

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