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PROFESSIONAL QUANDARIES AND QUAGMIRES

Ethical emergencies when a lawyer makes a mistake

By Chuck Lundberg
Special to Minnesota Lawyer

Imagine this emergency has just arisen at your law firm:

Today, Sally Associate realized that she has made a serious and possibly damaging mistake in one of her client's cases. [Think missing a mandatory deadline — a statute of limitations or an expert witness disclosure order.] Sally is very concerned that there may be ethics or malpractice issues, and she needs to talk with someone at the firm immediately about the mistake, about what to do now, about whether disclosure or other action is required, etc.

Who at your firm should Sally call for help in dealing with this emergency?

Firm counsel as first responder

Every law firm should have a designated *ethics partner* or *firm counsel*, a lawyer who advises the firm and its lawyers when ethics and risk management matters arise. For many reasons, the firm counsel role has become an essential part of managing a law firm.[1]

For ethical emergencies like Sally's, firm counsel is the firm's *First Responder* — someone designated to respond to an emergency. Sally should call or meet with firm counsel immediately. (NB: "Call or meet" is mandatory. One never communicates about such sensitive matters by email.)

Avoid compounding errors

A cardinal rule of First Responders is to avoid making matters worse. A recent Law360 article addresses this precise issue. *See* Mark Hinderks, *6 Ways to Avoid Compounding Errors When Practicing Law* (Law360, Jan. 3, 2023, paywall)[2]

The Hinderks article begins with a reminder of some ancient and self-evident truths: Everyone makes mistakes. A law firm is composed of people; to err is human. Mistakes will happen.

Sometimes the mistake has grave consequences. For lawyers and law firms, mistakes can result in claims of malpractice or ethics violations. When mistakes happen, the key for firm counsel is not to compound the error.

DEPOSIT PHOTOS

Here is the nub of the problem: When Sally realized the mistake had been made, *several brand-new ethics issues arose*, for Sally and the firm. Mishandling those new issues could result in ethical violations for failure of communication and conflict of interest, as well as increased malpractice exposure and potential loss of insurance coverage. The article identifies several of the issues, three of which are discussed here:

1. Comply with the duty to make timely disclosure of material errors to clients.

It is well-settled that lawyers have both legal and ethical duties to disclose to current clients material errors or mistakes during the representation. A failure to do so can give rise to liability for malpractice or breach of fiduciary duty; it also can have disciplinary consequences. See *Self-Reporting Malpractice or Ethics Problems*, (Bench & Bar of Minn. Sept. 2003) (hereafter "2003 Self-Reporting article") (citing authorities).[3]

In 2018, the ABA issued a formal ethics opinion that directly addressed these issues, ABA Form. Op. 481 "A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error" (2018).[4]

ABA Opinion 481 contains substantial and detailed analysis of the ethics issues. The Hinderks article discusses it at length, and the text of the opinion merits careful study when dealing with any lawyer error disclosure problem.

In the end, though, as Hinderks points out, the broad disclosure standard in Op. 481 weighs heavily in favor of disclosing to the client all errors that are not clearly inconsequential. Further, as discussed in the 2003 Self-Reporting article, other reasons often tend to favor disclosure by the firm, whether as a matter of prudence, strategy, or client relations.

2. Determine whether the error creates a material limitation conflict.

Sally's error triggered another new ethical issue for the firm: a Rule 1.7 (a)(2) "material limitation" conflict of interest problem. Because of the firm's potential liability for the error, there may now be a significant risk that the representation of the client going forward may be materially limited by a personal interest of the lawyer/firm, giving rise to additional affirmative ethical obligations 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).

As Hinderks notes, a potential claim between client and lawyer inserts itself as a wedge in the delicate fiduciary relationship of trust and confidence. Indeed, that kind of "diverging interests between attorney and client" is the hallmark of a material limitation conflict of interest, which requires withdrawal of the lawyer and law firm from the underlying representation, in the absence of an informed and effective waiver.

3. Be familiar with your malpractice policy and act to preserve coverage.

Finally, Hinderks discusses the importance of how and when to report the error to the malpractice insurer. Malpractice policies typically require timely reporting of claims and known circumstances that might ripen into a claim. The firm's decision whether and when to report Sally's mistake to the carrier may affect coverages, limits applicable to particular policy periods, and deductibles and self-insured amounts. Indeed, by the time a lawyer starts thinking about disclosing a potential malpractice problem to the client, there is already a legal duty to report it to the malpractice carrier.

The 2003 Self-Reporting article suggested that the error should be discussed with the malpractice carrier *before* any disclosure to the client. Most enlightened legal malpractice insurers are willing to assist lawyers in this situation with possible claim repair efforts.

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Minnesota-specific opinions to consider

From a national perspective, Op. 481 and Hinderks' analysis provides an essential framework for ethical analysis. However, Minnesota lawyers should be aware of several Minnesota-specific authorities that conceivably could lead to a different result in a particular case.

Several important Minnesota developments occurred in 2009:

First, the 8th U.S. Circuit Court of Appeals squarely addressed the legal issue in *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009). Applying Minnesota law, the court held that, to impose a legal 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'" citing the Restatement (Third) of the Law Governing Lawyers.

A few months later, the Minnesota Lawyers Board began the process of drafting a Board Opinion on the topic. In Spring 2009, proposed Op. 21 was published for comment. The proposal was very controversial in the legal community and was subject to much critique and discussion.

In October 2009, a much-revised version of Op. 21 was adopted. See Minnesota Lawyers Board Opinion 21, *A 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.")[5]

Finally, after ABA Op. 481 was published in 2018, OLPR and the Board were of two minds on what to do. In April 2019, the Board approved publishing for comment proposed amendments to Op. 21 that would "conform" Op. 21 to Op. 481. In January 2020, after considering comments, the Board voted down the proposed amendments. Finally, in April 2020, the Board voted to repeal LPRB Op. 21.

Minnesota law on these issues is addressed at length in Wernz, *Minn. Leg. Ethics* (12th ed 2022) at pp. 242-48, which analyzes in detail the differences between Op. 481 and repealed MN Op. 21.

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A firm facing a potential malpractice situation should report the claim to the malpractice carrier immediately and request counsel concerning whether, when, and how to disclose the matter to the client. Malpractice carriers will also 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.

Conclusion

In the end, while the firm's decision to disclose the mistake to the client will necessarily depend on careful analysis of the potential consequences of the error, it is imperative that Sally and every other firm lawyer be fully aware *in advance* that issues like this requires immediate attention by firm counsel. Mistakes will happen; we're all human. But if the firm does not learn of the mistake immediately, the chances of dealing with it correctly are greatly diminished.

Editor's note: In next month's Q&Q column, Bill Wernz will address various specific problem situations that can arise in dealing with mistakes in a law firm.

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).

Endnotes

1. See *Why Your Firm Needs an Ethics Partner* (Bench & Bar of Minn., Dec. 2016) , http://lundberglegalethics.com/wp-content/uploads/2019/04/1216-ethics-partner.pdf. Among other compelling reasons, the firm's attorney-client privilege may depend on whether Sally talks to designated ethics counsel vs. someone else at the firm.

2. https://www.stinson.com/newsroom-news-Risk-Management-for-Law-Firms-Detailed-by-Hinderks-in-Law360-Column

3. http://lundberglegalethics.com/wp-content/uploads/2017/11/self-reporting-malpractice-or-ethics-problems.pdf, *citing* 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). *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982); Restatement (Third) The Law Governing Lawyers (2000), Sec. 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.")

4.https://www.americanbar.org/content/dam/aba/images/abanews/ABAFormalOpinion481.pdf ("[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."

5. https://www.revisor.mn.gov/court_rules/pr/subtype/lawy/id/21/

SPONSORED CONTENT

EXPERT AFFIDAVITS IN ATTORNEY-CLIENT DISPUTES - ARE THEY REQUIRED?

By Ryan Downes

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In Minnesota, if you want to pursue an action against a licensed attorney based on "negligence or malpractice," and you will need to rely on expert testimony to establish a *prima facie* case, you are required to submit an affidavit from an expert stating an opinion that the target of your lawsuit deviated from the appropriate standard of care. Minn. Stat. § 544.42, subd. 2. But does this apply to claims for breach of fiduciary duty brought against an attorney?

That answer, as it so often is in the legal profession, is, "It depends." A recent decision handed down by the Minnesota Supreme Court, *Mittelstaedt v. Henney*, 969 N.W.2d 634 (Minn. 2022), has made it clear that, depending on the case, even breach of fiduciary duty claims against attorneys may require an expert affidavit under Minn. Stat. § 544.22.

The facts in *Mittelstaedt* were as follows: an attorney (Henney) represented a client (Mittelstaedt) in a business transaction, but the attorney allegedly failed to disclose to his client that he had an ownership interest in the other party to the transaction. 969 N.W.2d at 637. A dispute arose between the parties involving the attorney's representation, and the client brought, among others, a claim for breach of fiduciary duty against the attorney. *Id.* The district court granted summary judgment on the plaintiff's claim of breach of fiduciary duty, but did not address the "expert-affidavit issue." *Id.* at 638.

On appeal, the Court of Appeals affirmed the decision, but on different grounds. *Id.* at 638. Despite no party arguing that the provisions of Minn. Stat. § 544.42 was "important" on appeal, the Court of Appeals held that because breach-of-fiduciary duty claims against attorneys have the same elements as legal malpractice claims, the statute's affidavit requirements should apply, and the plaintiff had not submitted expert affidavits. *Id.* The Court of Appeals explained that if the statute did not apply, plaintiffs would have a "back door" to trial on claims against professionals without ever filing an expert affidavit. *Id.*

The Minnesota Supreme Court took up review of the expert-affidavit issue, and reversed and remanded to the Court of Appeals. *Id.* at 641. The Court first noted that it had "long held" that professional negligence and breach of fiduciary duty were "distinct claims" because "[p]rofessional negligence claims allege an attorney breached their standard of *care*, whereas breach-of-fiduciary-duty claims concern a standard of *conduct*." *Id.* at 639. To that end, the Court of Appeals had erred by holding that the two causes of action shared identical elements. *Id.*

Nevertheless, the Court noted, Minn. Stat. § 544.42's language—which covers "negligence or malpractice" actions—encompasses a breach of fiduciary duty claim because "malpractice" is a category that includes multiple legal theories for recovery against professionals, including breach of fiduciary duty. *I d.* As a result, the Court concluded that the statute's expert-affidavit requirement for negligence or malpractice cases unambiguously applies to breach-of-fiduciary-duty claims when the other requirements of the statute are met. *Id.*

What are those other requirements? Well, the Court noted that the expert-affidavit requirement applies only where expert testimony "is to be used" by a party to establish a *prima facie* case. *Id.* at 640 (quoting Minn. Stat. § 544.42, subd. 2). Whether expert testimony will be necessary is dependent on the facts of each individual case. *Id.* The Court noted that while the "duty" and "breach" elements of a legal malpractice claim must generally be established by expert testimony, an exception exists for cases where an attorneys' conduct can be "evaluated adequately by a jury in the absence of expert testimony". *Id.* As a result, whether expert testimony would be required for a breach-of-fiduciary-duty legal malpractice claim against an attorney would have to be decided on a case-by-case basis. *Id.* The answer, at the end of it all, was "It depends."

In light of the Mittelstaedt decision, attorneys should be proactive about evaluating whether a legal malpractice claim couched as a breach of fiduciary duty requires an expert affidavit. Submitting an expert affidavit even where you think a jury could evaluate the conduct at issue on its own may be the safe course to follow. Deciding to roll the dice and attempt to fit a claim into the exception to the rule may be risky. This is especially true because failure to adhere to the expert affidavit requirement can be a fatal mistake resulting in dismissal with prejudice and may, ironically, expose the attorney who brought the claim in the first place to a legal malpractice suit.

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