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ETHICAL DUTY OF ATTORNEY TO DISCLOSE ERRORS TO CLIENT

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Syllabus

As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, Colo. RPC 1.4, including those developments resulting from the lawyer's own errors. As part of this broad duty to report, a lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material. A material error is one that will likely result in prejudice to a client's right or claim. In these circumstances, the lawyer should inform the client that it may be advisable for the client to consult with independent counsel regarding the error, which may include advice regarding the statute of limitations on a claim for legal malpractice. Colo. RPC 1.4(b). The lawyer need not and should not inform the client that a legal malpractice claim against the lawyer actually exists or has merit, or of the desirability of terminating the lawyer's representation. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer may continue to represent the client in these circumstances only in compliance with Colo. RPC 1.7(a) and (b). In many, if not most, circumstances, the interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation. Continued representation may not be permissible if the lawyer might be influenced to pursue a strategy that would avoid liability for the lawyer at the expense of the success of the representation, or if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest. Finally, the lawyer may not obtain a release of liability except in compliance with Colo. RPC 1.8(h).

This opinion addresses the lawyer's ethical duty to advise the client of relevant developments resulting from the lawyer's own errors. This opinion does not address whether the failure to disclose an error itself gives rise to a cause of action against the lawyer. See Colo. RPC, Scope, ("Violation of a Rule should not in and of itself give rise to a cause of action nor should it create a presumption that a legal duty has been breached.").

The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

Analysis

Basis for the Duty in the Rules of Professional Conduct

Lawyers must keep clients "reasonably informed about the status of a matter." Colo. RPC 1.4(a)(2). The lawyer's explanation must be "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b). The ethical duty to inform the client extends to keeping the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation. Comment, Colo. RPC 1.4. Additionally, "[a] lawyer may not withhold information to serve the lawyer's own interests..." Comment, Colo. RPC 1.4. Significant developments include matters adverse to the client's interests and those resulting from the lawyer's own actions, if the lawyer's actions are likely to result in prejudice to a client's rights or claim. In addition, failing to disclose an error to a client may rise to the level of conduct involving dishonesty, fraud, deceit or misrepresentation under Colo. RPC 8.4(c). Colo. RPC 8.4(c) may apply if the lawyer actively and intentionally conceals the facts and circumstances of the error from the client,¹ or misrepresents facts about the error, and the client loses a valuable right, such as a right of appeal,² or releases a claim against the lawyer for legal malpractice.³

In the context of this opinion, a breach of a duty of care that will likely result in prejudice to a client's right or claim will be referred to as an "error," and disclosing an error to a client will mean drawing a client's attention to an error and not simply relying on the flow of paperwork sent to the client in the ordinary course of a representation. 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. "Error," as used in this opinion, is not meant to include an act or omission that a reasonable lawyer would conclude would not likely result in prejudice to a client's right or claim.

Various jurisdictions that have considered the issue have reached similar conclusions.⁴ Some legal authorities rely on the lawyer's obligation under the equivalent of Colo. RPC 1.4(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b).⁵ Other authorities cite the lawyer's obligation under the conflict of interest rules to obtain the client's informed consent to continued representation, on the basis that the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client.⁶ The conflict of interest rules would not apply, obviously, if the representation does not continue following the error.

Nature of Conduct that Triggers the Duty to Disclose

The more difficult determination is whether a particular error triggers an ethical duty to disclose it to the client. This determination is important because an overbroad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship.⁷ Also, the ethical duty to disclose should remain primarily a basis for a lawyer's self-assessment, not

another arrow in the quiver of tactics employed in legal malpractice cases.⁸ Whether a particular error gives rise to an ethical duty to disclose 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. The failure to disclose an error does not (and should not), in and of itself, give rise to a cause of action against the lawyer, nor does it (or should it) create a presumption that a legal duty has been breached.

Professional errors exist along a spectrum. At one end are errors that, as stated above, will likely prejudice a client's right or claim. Examples of these kinds of errors are the loss of a claim for failure to file it within a statutory limitations period or a failure to serve a notice of claim within a statutory time period. The lawyer must promptly inform the client of an error of this kind, if a disinterested lawyer would conclude there was an ethical duty to do so, because the client must decide whether to appeal the dismissal of the claim or pursue a legal malpractice action.⁹ Another example is the loss of a right of appeal for failure to file a timely notice of appeal. However, as discussed more fully below, the lawyer should be given an opportunity to remedy the error before disclosing it to the client.

At the other end of the spectrum are errors and possible errors 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. For example, missing a nonjurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may, upon discovery, prompt regretful frustration, but not an ethical duty to disclose to the client. As one commentator remarked regarding similar circumstances, "Unless there are steps that can be taken now to avoid the possibility of future harm, there is probably no immediate duty to disclose the mere possibility of lawyer error or omission."¹⁰ Lawyers should be given the opportunity to remedy any error before disclosing the error to the client. The later assertion of a legal malpractice claim does not mean that the allegedly negligent lawyer breached a duty to disclose the error to the client. Nor should the failure to disclose the error be construed as an independent claim against the lawyer.¹¹ Whether a lawyer has an ethical duty to disclose depends on the facts and circumstances known to the lawyer once he or she has realized the error, not those that appear only through the prism of hindsight.

In between these two ends of the spectrum are innumerable errors that do not fall neatly into either end of the spectrum and must be analyzed on an individual basis. For example, it is ordinarily not necessary to disclose questions of professional judgment where the law was unsettled on an issue or the attorney "made a tactical decision from among equally viable alternatives."¹² Under the doctrine of "judgmental immunity," these types of decisions are not, as a matter of law, considered errors, below the applicable standard of care, or negligent conduct. When reasonable lawyers may disagree about whether the state of the law was unsettled or the available alternatives were equally viable, however, the lawyer should err on the side of discussing the available alternatives with the client before pursuing a course of action.¹³ The lawyer's choice between equally viable alternatives should not be considered an error as defined in this opinion. Examples of 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. The Committee agrees with the New York State Bar Association that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or

omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim."¹⁴

What to Tell the Client

Although it can be difficult to determine whether a lawyer must call a client's attention to an error, it is relatively easy to describe what to say to the client when the lawyer has made the decision to disclose. Candor is a given. The result may be a surprisingly appreciative and understanding client. The lawyer need not advise the client about whether a valid claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so.¹⁵ The lawyer need not, and should not, make an admission of liability. What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

It may be advisable, however, to inform the client that it may be prudent to consult with independent counsel regarding the statute of limitations on a claim for legal malpractice, especially if, notwithstanding the disclosure, the attorney-client relationship continues in the matter giving rise to the potential claim. The lawyer need not, however, advise the client of the viability of a legal malpractice claim, but simply inform the client that it may be appropriate to seek independent advice from a disinterested lawyer.

The Rules of Professional Conduct do not require the disclosure to be in writing, but failing to make a written record of it is imprudent and potentially defeating of one of the purposes of the disclosure: protection of the lawyer. The letter informing the client of the error should also recommend that the client consult independent counsel to discuss the consequences of the error. This notice may itself trigger the accrual of a legal malpractice claim and, hence, the relevant statute of limitations.¹⁶ Even if the lawyer genuinely believes that it is in the client's best interests to continue the representation despite the error, the lawyer's own interests prohibit him or her from advising the client on this issue.¹⁷ The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

Conflicts of Interest in Continuing the Representation

Continuing the representation is not an option if (a) the client terminates it, (b) the error effectively concludes it, or (c) the lawyer withdraws because the error creates a nonwaivable conflict of interest. If both lawyer and client desire to continue the representation, Colo. RPC 1.7(a)(2) requires the lawyer to consider whether the lawyer's own interests in avoiding liability may materially limit the representation. If the lawyer concludes that the lawyer's own interests may materially limit the representation, continued representation is permissible only if the lawyer "reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client." Colo. RPC 1.7(b)(1).¹⁸ Additionally, in order for representation to continue, each affected client must give "informed consent, confirmed in writing." Colo. RPC 1.7(b)(4).

Whether or not continued representation is permissible, either because there is no potential conflict or the potential conflict is waivable, depends on the nature of the error. In many, if not most, circumstances the

interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation.¹⁹ Withdrawal is typically not required if the error likely can be corrected during the course of the representation; the error is not likely to result in harm to the client's cause; the error does not prejudice the client's right or claim, or the error does not necessarily constitute an error at all.²⁰ As one court stated:

Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk.²¹

In any event, a lawyer may not procure a release of liability from the client except in compliance with Colo. RPC 1.8(h). That rule prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or 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 association therewith."²² Colo. RPC 1.8(h)(1) and (2). Colo. RPC 1.8(h) would be applicable, for example, if a lawyer agreed to handle the client's appeal free of charge in exchange for a release of liability.²³

In other situations, a client cannot give informed consent, confirmed in writing, within the meaning of Colo. RPC 1.7(b)(4), because the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client, within the meaning of Colo. RPC 1.7(a)(2)), by influencing the lawyer's strategy. For example, in a personal injury case arising from an automobile accident involving a Regional Transportation District bus, the plaintiff's lawyer fails to give RTD timely notice of a potential claim against it as required by the Colorado Governmental Immunity Act. The plaintiff's lawyer files an action against another driver, who is uninsured. The uninsured driver files a notice of nonparty at fault, identifying RTD. At trial, the plaintiff's lawyer emphasizes the evidence against the uninsured driver and downplays the evidence against RTD. The jury returns a verdict assigning 75% fault against the uninsured driver and 25% against RTD. The judgment against the uninsured driver is uncollectible, and the plaintiff's lawyer's liability to his client is limited to 25% of the total damages. Another lawyer representing the plaintiff might have emphasized the evidence against RTD or proceeded directly to an action against the plaintiff's lawyer for malpractice.

The plaintiff's lawyer thus violated Colo. RPC 1.7(a)(2). His interest in limiting his liability to the client in a future legal malpractice claim caused him to adopt a litigation strategy that emphasized evidence that increased the fault attributable to the uninsured driver, thereby reducing the lawyer's liability exposure to the client and increasing the uncollectible portion of the judgment. Another lawyer representing the plaintiff would have emphasized evidence that decreased the fault attributable to the uninsured driver,

thereby increasing the lawyer's liability exposure to the client and decreasing the uncollectible portion of the judgment. Under the circumstances, the plaintiff's consent to the conflict was not validly obtained.

It is seldom so clear that a lawyer's independent judgment is materially limited by his or her interest in avoiding or reducing liability to a client. Indeed, the opposite problem may be more likely. To avoid the appearance of self-interest, a lawyer may be hesitant to adopt strategies that could leave that impression, including strategies that the lawyer genuinely believes to be in the client's best interests. A lawyer should consider this complication in deciding whether or not he or she wishes to continue the representation. If the representation continues, the lawyer may be able to avoid the appearance of self-interest by conferring with another lawyer about strategies that may, in the hindsight of a legal malpractice action, be labeled self-serving. The lawyer may also suggest the retention of co-counsel.

Notes

¹ CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).

² *E.g.*, *Kentucky Bar Ass'n v. Cowden*, 727 S.W.2d 403, 404-05 (Ken. 1987).

³ CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995). Accord *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982); see also *People v. Good*, 576 P.2d 1020, 1022 (Colo. 1978) (finding violation of former Code equivalent of Colo. RPC 1.8(h) where lawyer refunded retainer with check containing restrictive endorsement releasing claims against lawyer).

⁴ See *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995), *relevant holding confirmed but decision abrogated on other grounds*, *Olds v. Donnelly*, 696 A.2d 633, 642 (N.J. 1997); *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982); New Jersey Supreme Court Advisory Committee on Professional Ethics 684 (March 9, 1998); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000); Association of the Bar of the City of New York Formal Opinion 1995-2 (Feb. 22, 1995).

⁵ See *Circle Chevrolet*, *supra* (New Jersey Rule 1.4); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000) (New York equivalent of Colo. RPC 1.4); Pennsylvania Bar Association Informal Opinion 97-56 (June 6, 1997) (Pennsylvania equivalent of Colo. RPC 1.4). Accord Restatement (Third) of the Law Governing Lawyers § 20, Comment c; American Bar Association Informal Opinion 1010 (Nov. 18, 1967).

⁶ *E.g.*, *Circle Chevrolet*, *supra*, 662 A.2d at 514.

⁷ See N. Moore, "Implications of *Circle Chevrolet* for Attorney Malpractice and Attorney Ethics," 28 *Rutgers L.J.* 57, 75 n. 85 (Autumn 1996) (suggesting that clients of lawyer, like patients of physician, do not want to "know every time the physician has doubts or second thoughts about any aspect of some ongoing treatment") (hereinafter "Moore").

⁸ See Preamble, Scope and Terminology, Colo. RPC (purpose of Rules of Professional Conduct "can be subverted when they are invoked by opposing parties as procedural weapons"; "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty"); Colo. RPC 4.5(a) (lawyer shall not threaten or present, or participate in presenting, disciplinary charges to gain advantage in a civil matter); see also *Weiss v. Manfredi*, 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (N.Y. 1994) (attorney's failure to disclose malpractice does not give rise to fraud claim separate from customary malpractice action).

⁹ Moore, *supra* n. 7, at 73. See *Cowden*, *supra*, 727 S.W.2d at 404-05 (lawyer's failure to advise client of dismissal of action for failure to file prior to expiration of statute of limitations was particularly important because dismissal may have been erroneous).

¹⁰ Moore, *supra* n. 7, at 74.

¹¹ E.g., *In re Knappenberger*, 90 P.3d 614 (Ore. 2004) (attorney had no immediate duty to alert client regarding potential malpractice claim arising from opposing party's filing of motion to dismiss appeal as untimely where lawyer reasonably believed motion had little chance of success).

¹² *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300, 304 (D. Colo. 1995); *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985).

¹³ See Cmt., *Withholding Information*, Colo. RPC 1.4 (lawyer "may not withhold information to serve the lawyer's own interest or convenience").

¹⁴ N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

¹⁵ New York City Opinion 1995-2 (Feb. 22, 1995); S. O'Neal, "If You Make a Mistake, When and What Should You Tell Your Client?," 2000-FEB *W. Va. Law.* 24, 25 (Feb. 2000) (hereinafter, "O'Neal").

¹⁶ O'Neal, *supra* n. 15, at 25; see New York State Opinion 275 (1972) (upon withdrawing from representation, lawyer should recommend that client obtain other counsel) (cited with approval in New York State Opinion 734 (Nov. 1, 2000)).

¹⁷ O'Neal, *supra* n. 15, at 25.

¹⁸ See *In re Lawrence*, 31 P.3d 1078, 1084 (Or. 2001) (lawyer violated conflict of interest rule by failing to inform client in writing of potential conflict of interest caused by continuing representation of client in domestic relations matter following entry of default against client due to attorney's neglect).

¹⁹ See D. Karpman, "A Twilight Zone of Inharmonic Convergence," *California Bar Journal* 20 (February 2004) ("it is doubtful that any other lawyer in the entire world would be as motivated to make sure the client is successful" than the one who commits malpractice and continues the representation); Pennsylvania Informal Opinion No. 97-56 (June 6, 1997) (law firm's interest and motivation in trying to win appeal from dismissal of case based on law firm's negligence are same as client's interest and motivation in trying to win appeal).

²⁰ N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

²¹ *In re Knappenberger*, 90 P.3d 614, 622 (Or. 2004).

²² Colo. RPC 1.8(h).

²³ Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).