

Louisiana State Bar Association
PUBLIC Opinion 16-RPCC-20¹
Communication Regarding Potential Malpractice

August 23, 2016

During the representation of a client, when a lawyer commits a significant mistake or error that may materially affect a client's case, the lawyer is obligated to follow Rule 1.4 of the Louisiana Rules of Professional Conduct, which requires disclosure of that information to the client. Additionally, where a lawyer desires to take steps to correct that error, written notice and a waiver from the client is required under Rule 1.7(b) for continued representation. If a lawyer seeks to attempt to settle a potential legal malpractice claim with a client, Rule 1.8(h) requires that the lawyer first provide written notice to the client of the desirability of obtaining the advice of independent legal counsel, and the client should be afforded a reasonable opportunity to seek and obtain that advice.

Lawyers unfortunately make mistakes. The issue of how a lawyer should handle communications with a client after the lawyer makes a mistake or has potentially committed malpractice has been discussed in ethics opinions issued by bar associations in Colorado and North Carolina.² Those opinions make clear that a lawyer has a duty, pursuant to Rule 1.4 of the ABA Model Rules of Professional Conduct, to disclose potential errors or mistakes to the client.

The Committee has evaluated the ethical ramifications stemming from an error made by a Louisiana lawyer that results in a potential legal malpractice claim. In its consideration, the Committee believes that Rules 1.4³, 1.7⁴ and 1.8(h)⁵ of the Louisiana Rules of Professional

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² Formal Ethics Opinion 113 from Colorado and 2015 Formal Ethics Opinion 4 from North Carolina.

³ Rule 1.4 of the Louisiana Rules of Professional Conduct, in pertinent part, provides: “*Communication. (a)*

Conduct are most relevant.

Disclosure

When an error is made, what does a lawyer need to disclose to the client? If the mistake is minor, insignificant or irrelevant to a client's case, there may be no need to disclose the error. However, where a mistake materially affects the case, the lawyer must inform the client. For example, a calendaring error could cause a lawyer to miss a prescription date. Rule 1.4 requires a lawyer to "...keep the client reasonably informed about the status of the matter..." and to provide "...sufficient information..." to the client so that the client can "...participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued..." Thus, the lawyer must inform the client about missing the prescription date even if making that disclosure is uncomfortable.

The Supreme Court of Louisiana reiterated the obligation to disclose lawyer errors in the *Lomont*⁶ case, stating that, pursuant to Rule 1.4, "there was a duty to speak". When something significant happens in a case, sufficient information should be provided to the client to enable the client to participate intelligently in any decision-making necessitated by the event. While a lawyer may not have to admit liability, the lawyer must disclose sufficient details as to what

A lawyer shall:...(3) keep the client reasonably informed about the status of the matter;...(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued..."

⁴ Rule 1.7 of the Louisiana Rules of Professional Conduct, in pertinent part, provides: "...*(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:...(2) there is a significant risk that the representation of one or more clients will be materially limited ...by a personal interest of the lawyer...*"

⁵ Rule 1.8(h) of the Louisiana Rules of Professional Conduct, in pertinent part, provides: "...*A lawyer shall not:... (2) 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 connection therewith...*"

⁶ *Lomont v. Myer-Bennett*, 172 So.3d 620 (La. 2015).

happened and should, at least, explain that mistakes may give rise to legal claims against lawyers. Depending upon the circumstances—and in light of Rule 1.8(h)—the lawyer may even wish to consider advising the client of the opportunity to seek advice from independent legal counsel. Best practices dictate that the lawyer should document that conversation in writing. The Supreme Court of Louisiana in the *Lomont* case expected an experienced lawyer to have documentation of necessary disclosures to a client.

Correcting the Problem

After an error occurs, can the lawyer attempt to correct the problem? When potential legal malpractice has occurred, a conflict of interest with the client is oftentimes created. The lawyer has a personal financial interest in avoiding, minimizing and/or defending against any claim that may be raised and/or filed against the lawyer. The lawyer also may want to minimize or limit any publicity regarding the error or mistake. In many instances, there is a natural inclination for the lawyer to try to correct the error or mistake. However, once a material error occurs, a concurrent conflict of interest often exists. If a lawyer desires to take steps to correct the problem, a written waiver from the client is required by Rule 1.7(b) of the Louisiana Rules of Professional Conduct. Rule 1.7 basically provides that a lawyer cannot represent a client if “...*the representation is materially limited by a personal interest of the lawyer...*”

However part (b) of Rule 1.7 provides an exception to that basic rule:

...(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing....

Thus, even when there is a concurrent conflict of interest as a result of the personal interests of the lawyer, the lawyer may continue to work on the client's case so long as the factors of Rule 1.7(b) are met, such that: 1) it is reasonable to do so; 2) the representation is not otherwise prohibited by law; 3) the lawyer is not representing one client against another client in the same matter; and 4) the client is advised of the circumstances and risks associated with the continued representation and provides informed consent in writing to that continued representation. As part of the "informed consent", the lawyer should disclose that there is a conflict of interest between the lawyer and client and, depending on the circumstances, the lawyer might consider including: a description of the lawyer's mistake; the fact that the mistake may give rise to a legal claim against the lawyer; the preemptive period applicable to the claim; the lawyer's plan to address the problem; and perhaps, depending upon the circumstances, advice that the client may wish to consider the desirability of seeking the advice of independent legal counsel.⁷ It should be noted that not every situation is appropriate for continued representation with the informed consent of the client in writing, as the lawyer's error may have no remedy, or the lawyer's interests may significantly outweigh those of the client. Any evaluation as to the reasonableness of continued representation should be made from the perspective of a reasonable, disinterested lawyer.

Settling Liability

⁷ Rule 1.7(b) of the Louisiana Rules of Professional Conduct does not expressly require that a lawyer advise a client of the desirability of seeking the advice of independent counsel, but it does require that a lawyer seeking to continue with representation in the face of a concurrent conflict of interest seek and obtain the client's informed consent to the continued representation despite the existence of that concurrent conflict of interest. One of the examples of concurrent conflicts of interest noted specifically within Rule 1.7 is when there is a significant risk that the representation of the client will be materially limited by the lawyer's own personal interest. A lawyer's own personal interest in downplaying or minimizing the effect(s) of the lawyer's mistakes with the representation, depending upon the circumstances, may materially limit that lawyer's representation of the client. Hence, Rule 1.8(h)(1) clearly prohibits a lawyer from making an agreement prospectively limiting the lawyer's liability for legal malpractice where the client is not independently represented in making such an agreement. And Rule 1.8(h)(2) prohibits a lawyer from settling a claim or potential claim for professional liability unless the client is first advised in writing of the desirability of seeking—and is given a reasonable opportunity to seek—the advice of independent legal counsel in connection with the claim or potential claim for professional liability. Thus, depending upon the circumstances, in order for the client to provide informed consent and/or in order for the lawyer to meet "best practices," it may be prudent and appropriate for a lawyer to advise a client of the desirability of seeking independent legal advice.

What if the lawyer who made an error wants to settle with the client regarding any liability for the lawyer's actions? Rule 1.8(h) of the Louisiana Rules of Professional Conduct provides:

...A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or (2) 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 that the advice of independent legal counsel in connection therewith...

Dunn⁸ and other decisions from the Supreme Court of Louisiana make clear that, under Rule 1.8(h), prior to attempting to settle a potential legal malpractice claim with a client, the lawyer must advise the client in writing of the desirability of seeking--and give the client a reasonable opportunity to seek--the advice of independent legal counsel.⁹ In Dunn, the Louisiana Attorney Disciplinary Board was "...concerned that Respondent settled a malpractice claim without advising his client to seek independent counsel, which creates a conflict of interest regardless of how fair the settlement terms appear..."¹⁰ Thus, no matter how even-handed a proposed legal malpractice settlement might be, a lawyer seeking to limit his or her own professional liability must first advise the client in writing that the client should seek the advice of an independent lawyer regarding any proposed settlement, and give that client a reasonable opportunity to seek such advice before proceeding with any settlement attempts.

Conclusion

During the representation of a client, when the lawyer commits a significant mistake or error that may materially affect the client's case, the lawyer is obligated to follow Rule 1.4 of the Louisiana Rules of Professional Conduct, which requires disclosure of that information to the client. Additionally, where a lawyer desires to take steps to correct that error and continue with the representation, notice and a written waiver from the client is required under Rule 1.7(b). If a lawyer seeks to attempt to settle a potential legal malpractice claim with a client, Rule 1.8(h) requires that a lawyer first provide written notice to the client of the desirability of obtaining the

⁸ *In Re Dunn*, 713 So.2d 461 (La. 1998).

⁹ See *In Re Thompson*, 712 So.2d 72 (La. 1998) and *In Re Petal*, 972 So.2d 1142 (La. 1998).

¹⁰ *Supra*, footnote 8.

advice of independent legal counsel, and the client should be afforded a reasonable opportunity to seek and obtain that advice.