CNA PROfessional COUNSEL℠

TO ERR IS HUMAN: MANAGING THE DISCLOSURE OF MISTAKES TO CLIENTS

A CNA PROFESSIONAL COUNSEL GUIDE FOR LAWYERS AND LAW FIRMS

I. INTRODUCTION

Lawyers are human and humans make mistakes. In fact, even the most conscientious, hardworking and diligent attorney may make a mistake of significant consequence at some point in his or her legal career. The mistake may even be serious enough to lead to a legal malpractice claim. However, the attorney's management of the mistake is often more important than the mistake itself and can exacerbate the simple malpractice situation and give rise to disciplinary grievances or other claims and increased damages.

As they say in political contexts, "it is not the act, but the cover up" that must be avoided. It is only natural to want to hide mistakes. Lawyers are embarrassed to admit to their clients and colleagues that they have made a mistake. However, instinctual impulses aside, attorneys have ethical and professional duties to disclose their mistakes to their clients.[1]

An attorney has a duty to keep a client reasonably informed about the status of a matter and to make informed decisions concerning the representation. This duty is premised upon both the common law fiduciary relationship and the Rules of Professional Conduct. In addition, once a decision has been made to disclose a mistake to a client, an attorney must determine whether he or she can continue to represent that client based on a possible conflict of interest.

All errors are not equal. Some errors may not in fact be errors at all. Some errors may be correctible. Some errors may not constitute legal malpractice or are not particularly harmful to the client's cause. Jurisdictions may differ on what the attorney's duties are in the face of an error. Jurisdictions may also differ on exactly what information must be disclosed to the client.

This guide will address the relevant rules and initial considerations that an attorney must implement when a mistake has been discovered. It will help in determining when disclosure to the client is necessary, how and what that disclosure should consist of, and how to manage conflicts of interest. In an attached appendix, the guide also provides selected cases, ethics opinions and the status of relevant disclosure rules from different jurisdictions concerning obligations to report errors to clients

II. RULES AND AUTHORITY ESTABLISHING DUTY TO REPORT ERRORS TO CLIENTS

To help analyze the issue of disclosing mistakes to clients, it is important to view the underlying legal sources that give rise to that duty.

1. Restatement of the Law Governing Lawyers

The Restatement (Third) of the Law Governing Lawyers generally requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[2] Specifically addressing the issue of the duty to self-report an error to a client, comment "c" to the Restatement states that, "If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client."[3]

The Restatement comment also provides an example of a disclosure situation, where "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]

1 In addition, lawyers may have contractual obligations to report errors and mistakes to their insurance carriers. Lawyers should always check with their insurance agent and/or review their professional liability policy to determine their obligation to report to the carrier any facts or circumstances of which the lawyer is aware that may give rise to a malpractice claim.

2 See American Law Institute (ALI), Restatement (Third) of the Law Governing Lawyers, A Lawyer's Duty to Inform and Consult with A Client, REST 3d LGOVL, Section 20 (2000). Note, full text of Restatement included in Appendix A.

3 See Comment "c" to Restatement (Third) of the Law Governing Lawyers, A Lawyer's Duty to Inform and Consult with A Client, Section 20.

4 Id.

2. Model Rule 1.4: Communication with Client

Model Rule 1.4 is the main rule of professional conduct that gives rise to the duty to disclose to a client in the event of an error. Model Rule 1.4 requires that a "lawyer shall keep the client reasonably informed about the status of the matter" and "explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[5]

Comments to Rule 1.4 help further articulate the reasons underlying the duty to disclose information to a client. Comment 1 notes that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Comment 7 to Rule 1.4 states that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."[6]

3. Model Rule 1.7 – Conflict of Interest

In addition to the Rule 1.4 duty to keep a client informed about a mistake, once an attorney recognizes they have made a mistake, they also have a duty to avoid conflicts between the lawyer's own interests and the interests of the client.

Rule 1.7(a)(2) requires that "a lawyer not represent a client…if there is a significant risk that the representation of one or more clients will be materially limited by…a personal interest of the lawyer."[7]

In light of this conflict rule, the continued representation of the client without adequate disclosure of the mistake, and possibly even the potential malpractice claim against the lawyer, may violate Rule 1.7(a)(2), in that the representation may be materially limited by the attorney's own interests.

4. Common Law of Fiduciary Relationships

Commentators have noted that these two Model Rules of Professional Conduct have derived from the common law of fiduciary relationships.[8] A lawyer as fiduciary is held to the "highest standard of conduct." A lawyer "must exercise the upmost good faith in his dealings," and "make full and honest disclosure of material facts and refrain from taking any advantage" of a client.[9]

The "highest standard of conduct" concept flows from lawyers' "special training, knowledge and expertise."[10] Further, as an "expert on the law, the lawyer is in the best position to know when a mistake" has been made and the "significance of the mistake."[11] Thus, if a lawyer does not disclose a mistake to a client, there is a reasonable possibility that the client will not discover the error.

Along this line of reasoning, a body of case law has developed which holds that when an attorney discovers that a mistake has been made by a prior counsel, he or she may be required to advise the client that there is a "viable malpractice action against the attorney's predecessor" counsel.[12] It stands to reason then that if an attorney must advise a client of a potential malpractice action concerning a predecessor counsel, clients may reasonably expect a report of an error or potential malpractice action by the attorney who "actually committed the error."[13]

5 See American Bar Association (ABA), Center for Professional Responsibility, Model Rules of Professional Conduct, Model Rule 1.4: Communication. Note, the full text of the current rule and the Pre-2002 Model Rule 1.4 and a list of which states have adopted the rule is provided in attached Appendix A and B.

6 See Comments 1 and 7 to Model Rule 1.4.

7 See ABA Center for Professional Responsibility, Model Rules of Professional Conduct, Model Rule 1.7: Conflict of Interest: Current Clients. Note, the full text of the Current Rule 1.7 is provided in attached Appendix A.

8 See Cooper, Benjamin P., "The Lawyer's Duty to Inform His Client of His Own Malpractice," 61 Baylor L. Rev. 174, pp. 186-87 (Winter 2009).

9 See Id. at 186 (citing Lester Brickman, "The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5," U. Ill. L, Rev. 1181, 1184 (2003)).

10 See Id. at 187.

11 See Id.

12 See Id. at 185-86.

13 See Id. at 186.

III. HOW TO COMPLY WITH THE DUTY TO DISCLOSE ERRORS TO THE CLIENT

It seems clear from the Restatement, the Rules and common law that attorneys have a clear duty to report errors and potential malpractice claims to their clients.

However, not as clearly defined or answered are four categories of questions that flow from the duty:

(**A**) What type of errors actually require reporting? Do all errors have to be reported, or only substantial errors?

(**B**) Once a decision has been made to report an error or potential malpractice action to a client, when does the report have to be made? Immediately during the representation, or at the end of the case when the representation is over?

(**C**) What information has to be reported? Jurisdictions differ on whether an attorney must note only the existence of a mistake, or the existence of both the mistake and that a potential malpractice action that may exist against the attorney.

(**D**) After disclosing an error to the client, is there a conflict of interest preventing continued representation of that client?

1. Types of Errors that Must Be Reported

All errors are not equal. Errors can range from the most minor typographical error with no prejudice to a client, to a mistake that results in a complete dismissal of a client's matter and significant prejudice to the client's interest. In addition, there can be errors that could have an effect on a client's interest but are correctible. If the error is corrected and there is no expense to the client, there is "nothing to report and no conflict for the lawyer to worry about."[14]

An ethics opinion described this range in errors as the "spectrum of errors."[15] At one end of this spectrum are "material" errors that prejudice a client's rights or claims.[16] An example of these types of errors is the loss of a claim for failure to file it or assert it within a limitations period or before a deadline.[17] The standard is whether a disinterested lawyer would conclude that the error would likely result in prejudice to a client's rights or claims.[18] If yes, then the error must be reported to the client.

On the other end of the spectrum are errors and possible errors that do not cause harm to the client. Examples of such non-prejudicial errors are typographical errors, or missing a non-jurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense.[19] These types of errors can sometimes lead to a malpractice claim, but there may not be an obligation to disclose to the client.

Whether a lawyer has a duty to disclose depends on facts and circumstances known to the lawyer at the time the error is discovered – and not those errors revealed as part of a subsequent investigation or recognized in hindsight.[20] In addition, a lawyer should be given an opportunity to correct the error or omission before having to disclose the error to the client.[21] The materiality standard recognizes the principal of "no harm, no foul."[22]

In between these two extremes are errors that fall somewhere in the middle. These are the type of errors that keep lawyers up at night. They must be analyzed on a case-by-case basis.

14 Cooper, supra note 8, at 195.
15 Colorado Formal Ethics Op. 113 (November 19, 2005).
16 Cooper, supra note 8, at 195.
17 Co. Ethics Op. 113, supra note 15.
18 Id.
19 Id.
20 Id.
21 Id.
22 Cooper, supra note 8, at 198.

Examples that fall into this category and do not need to be reported may include "judgment calls" by the attorney in situations where the law is unsettled or a tactical decision is made between equally viable alternatives.[23] Examples of errors that should be reported include failure to request a jury in a pleading (or to pay the jury trial fee), failure to include an acceleration provision in a promissory note, or failure to give timely notice under a contract or statute.[24]

Reasonable attorneys could differ on whether these "in-the-middle-of-the-spectrum" situations should or should not be reported to the client. Attorneys may have to make a difficult judgment call. In these situations, it may be necessary for an attorney to consult with outside counsel to receive a disinterested attorney's opinion before deciding whether or not to disclose the information.

2. When Does the Report to the Client Have to be Made

Once it has been decided that a report has to be made to the client, there is some confusion about the required timing of the report. The Restatement states that the report has to be made when the lawyer's conduct of the matter gives the client a "substantial malpractice claim" against the lawyer. As legal malpractice practitioners know, one of the four typical elements of a legally cognizable malpractice claim is "damages."[25]

There certainly can be situations when an error has occurred, but the client has not technically been damaged. For example, an attorney realizes that a provision in a contract was not included and cannot be rectified, but the client will not suffer damages until years after the discovery of the error, when the contract is enforced.

However, the problem with the existence of a "substantial malpractice" analysis is the language of Rule 1.4 and the fiduciary duties owed to the client. The client needs to be reasonably informed about the status of the matter in order to make informed decisions regarding the representation.

In the contract example, the client should be informed of the missing provision to allow them to take remedial measures, such as discharging the current counsel and hiring a new attorney, and deciding whether or not to pursue a legal malpractice claim against the first attorney. The client cannot make an informed decision if the error known by the attorney is concealed until the damages occur.

Thus, despite the language in the Restatement, the attorney must report the error to the client "promptly" or as soon as the attorney knows of the error and has determined that the error cannot be rectified.[26]

3. What Has to Be Disclosed to the Client

Once the attorney has concluded that an error has been made and must be reported to the client as soon as is practical, the next question is what exactly has to be told to the client. Can the client be told only that the case was dismissed due to the failure to file a complaint before the expiration of the statute of limitations? Or, must the client also be informed that they may have a malpractice action against the attorney?

A Pennsylvania ethics opinion stated that an attorney only had a duty to disclose material developments in a case such as the dismissal of a case based on a statute of limitations issue.[27] However, this jurisdiction is in the minority on this question.[28]

23 *Co. Ethics Op.* 113, supra note 15.
24 Id.
25 Cooper, supra note 8, at 194. (A malpractice claim typically requires duty, breach of that duty, causation or proximate cause and damages).
26 *In Re Tallon*, 447 N.Y.S,.2d 50, 51 (N.Y. App. Div. 1982).
27 Penn Bar Assn Comm. on Legal Ethics and Prof. Resp., Informal Op,. 97-56 (1997).
28 Pollock, Brian, "Second Chance: Surviving a Screw up," 34 No. 2 Litig. 19, 20 (2008).

The majority of jurisdictions that have considered the question (including Minnesota, New Jersey, New York, and Wisconsin) state that a lawyer has an ethical obligation to promptly notify the client of both the failure to act and of the possible malpractice claim against the attorney.[29]

However, regardless of whether or not an attorney is required to disclose the potential malpractice action to the client, the attorney should proceed cautiously in this area. A potential conflict exists in advising the client about a possible malpractice action. This will be discussed more fully in the next section.

A Colorado ethics opinion took a hybrid approach regarding what to disclose and stated that an "attorney need not advise the client about whether a claim for malpractice exists."[30] However, the opinion suggested that an attorney should disclose the facts surrounding the error and 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."[31] In addition, the attorney should not simply "admit liability," and should consider the impact of the disclosure on their malpractice insurance coverage.[32]

The approach used in this opinion is sensible in that it does not allow the lawyer to venture too far in advising the client on the malpractice matter, but fulfills the attorney's fiduciary duty to uphold the highest standard of conduct in representing a client. It lets the client know the facts surrounding the error and provides the client an opportunity to seek out the advice of independent counsel as to whether or not malpractice occurred.

4. How To Disclose To The Client

As difficult as it may be for the lawyer, an attempt should be made to initially disclose the error in a face-to-face meeting. Avoid leaving the information on a voicemail or sending the initial notice by e-mail. Oftentimes, a client will appreciate the candor of the attorney, and this can go a long way towards avoiding a protracted legal malpractice action by the client.

After the face-to-face meeting, the attorney should memorialize the meeting in a letter or e-mail to the client. This helps to protect the lawyer in any subsequent legal malpractice matter if there is any question about the timing of the notice and what the attorney told the client about the error.[33] Extreme care should be used in drafting any notice of error, as the writing will likely become an exhibit in any subsequent legal malpractice matter.

5. Conflict Considerations

As discussed earlier, Rule 1.7(a)(2) prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the personal interests of the lawyer.

There are two typical conflict models that the lawyer should avoid. A lawyer might attempt to hide the mistake by settling the case or to mitigate the potential damages available in a subsequent malpractice case.[34] Or, the lawyer might be personally motivated to avoid settlement for a lesser amount and force the case to a trial to vindicate their conduct.[35] In both examples, the attorney is putting his or her personal interests over the interests of the client.

Other conflict situations arise when the interests of the client and the attorney become directly adverse. For example, following the attorney's notification of the error, the client responds that they wish to pursue a malpractice claim against

29 Id.; See also, Restatement, supra note 2; *Tallon*, supra note 27, at 51; Lundberg, Charles E., Bench and Bar of Minnesota, Vol. 60, No. 8 (Sept 2003); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 662 A.2d 509 (N.J. 1995)(abrogated on other grounds by *Olds v. Donnelly*, 696 A.2d 663 (N.J. 1997)); *New York State Ethics Op.* 734 (2000); *Wis. Eth.* Op. 82-12.

30 Co. *Ethics Op.* 113, supra note 15.

31 Id.

32 Id.; attorneys should check with their agent and review the language of their professional liability policy.

33 Note while the disclosure itself does not have to be in writing, Rule 1.7(b)(4) requires that any informed consent to continue the representation be made in writing.

34 Pollock, supra note 28, at 21.

35 Id.

the attorney. In this example, there is a strong possibility that a conflict has developed because the attorney and client will soon be direct adversaries, and it will be difficult for the attorney to render impartial advice.

If the client has filed a claim or an ethical grievance against the attorney and the attorney believes that he or she should withdraw due to the conflict, care should be taken to formally withdraw from the representation if that is required in the jurisdiction.

If after disclosure of the error, the client and the attorney desire to continue the representation,[36] Rule 1.7(b) requires that the lawyer consider whether the lawyer's own interests in avoiding liability may materially limit the representation, causing a concurrent conflict of interest. If the lawyer concludes that there may be a concurrent conflict of interest, continued representation is permissible only if the lawyer reasonably believes that the lawyer can provide competent and diligent representation and the client consents in writing.[37]

Extreme care should be taken in drafting the written consent for the client. If a problem develops later, the written document will be subject to second-guessing, and likely will be an exhibit in any subsequent legal malpractice matter. Additionally, if all relevant facts are not fully disclosed in the consent document, the client may claim that he or she would not have agreed to the conflict had they known all the facts.

To determine whether continued representation is permissible, attorneys need to weigh several factors. How clear is it that the attorney was negligent? Can the error be rectified or remedied without harm to the client? How severe are the potential consequences to the client caused by the mistake? What is the potential for a substantial legal malpractice claim against the attorney for the mistake? In addition to the mistake, has the client threatened a malpractice claim?[38]

Generally, the conflict analysis centers on the fact that the greater the risk that the lawyer will face a substantial malpractice claim due to the error, the greater the likelihood the attorney's personal interest and ability to provide impartial advice will become compromised and the representation of that client will be materially limited.

One last consideration should be given to an attorney settling a malpractice action or claim with an unrepresented client. Model Rule 1.8 (h) prohibits an attorney from settling a claim or potential claim with a former client unless that person is advised in writing and given the reasonable opportunity to seek the advice of independent legal counsel.[39] Moreover, in addition to promptly reporting to their professional liability insurer an error that could result in a future claim as well as any actual malpractice action or claim, the attorney should always consult with the insurer prior to attempting to settle a matter or obtain a release.

IV. CONSEQUENCES OF FAILURE TO TIMELY NOTIFY THE CLIENT OF A MISTAKE

The consequences for attorneys who fail to comply with their self-reporting duty are serious, with seven potential ramifications. First, attorneys may be subject to professional discipline for failure to comply with Rules 1.4 and/or 1.7 or other related rules.[40] Depending on the severity of the underlying misconduct, discipline can range from a reprimand to disbarment. The potential discipline will increase the more egregious the conduct and the more significant the detriment to the client.

36 Note that a client will often consent to continued representation by the attorney because the client can wait until the end of the representation to decide whether or not to pursue a malpractice action against the attorney.

37 See Rule 1.7(b); See also *Co. Ethics Op.* 113, supra note 15.

38 Pollock, supra note 28, at 20-21.

39 See ABA Center for Professional Responsibility, Model Rules of Professional Conduct, Model Rule 1.8(h).

40 See *Attorney Grievance Comm'n of Md. v. Pennington*, 876 A.2d 642 (Md. 2005)

Second, there is a substantial increase in the likelihood that the client will pursue a malpractice claim against the attorney. Even a long-time, loyal client may be more inclined to pursue a claim if they felt that the attorney had hidden a mistake from them. In addition, a client who is angry that the attorney failed to timely disclose an error may be less inclined to agree to a fair settlement.

Third, there is an increased risk this will result in additional causes of action. Allegations of a conflict of interest and improper management of a case after the lawyer realizes a mistake occurred can lead to a claim for breach of fiduciary duty. Thus, an attorney must defend against both negligence and breach of fiduciary duty claims.

A claim based upon a violation of an ethical duty can damage an attorney's reputation before the jury. In addition, a plaintiff with a fiduciary duty claim may have an easier time proving his or her case.[41] The causation standard for a breach of fiduciary duty claim is less stringent than that for a claim alleging malpractice negligence.[42]

Also, due to a lawyer's failure to disclose an error, a client may be able to pursue claims for emotional distress that are typically not permitted in legal malpractice claims.[43] Emotional distress damages typically "cannot be recovered in a legal malpractice action unless there is a 'heightened level of culpability', such as failure to disclose an error."[44]

Fourth, damages may be increased due to the additional causes of action, especially for breach of fiduciary duty. Failure to timely notify the client of a mistake could lead to larger damage awards by juries and the imposition of punitive damages.[45]

Punitive damages are often not covered by professional liability policies. Some states forbid insuring against punitive damages for public policy reasons.[46] In such jurisdictions, attorneys who do not properly disclose a mistake to a client can face personal exposure.

Fifth, the failure to disclose an error may extend the limitations period to sue the lawyer, permitting, for instance, a fraud claim that might have a longer statute of limitations.[47] Not informing a client as to the dismissal of a matter may also toll the statute of limitations or the statute of repose periods.[48]

Sixth, in certain circumstances, an attorney may be required to return all fees earned during the course of representation, even those earned before the conflict arose.[49] In addition, a majority of courts have held that a client need not prove that the attorney's breach of fiduciary duty caused the client any damages to be entitled to fee disgorgement.[50]

Last, the failure to disclose a mistake can jeopardize the law firm's attorney-client privilege for communications relating to the mistake. Courts have generally held that attorney-client privilege protects internal law firm communications with a firm's ethics committee or general counsel engaged for the purpose of obtaining legal advice.[51] However, some courts have concluded that internal firm communications that took place during the representation may not be protected.[52]

41 Pollock, supra note 28, at 21.
42 Id.; See, e.g., *Estate of Re v. Kornstein, Veisz & Wexler*, 958 F. Supp 907, 927(S.D.N.Y. 1997).
43 See *Beis v. Bowers*, 649 So.2d 1094, 1097 (La. Ct. App. 1995); *McAlister v. Slosberg*, 658 A.2d 658 (Me. 1995).
44 Pollock, supra note 28, at 22 (citing *Akutagawa v. Laflin, Pick & Heer*, 126 P.3d 1138, 1143 (N.M. Ct. App. 2005)).
45 See *Asphalt Eng'rs, Inc. v. Galusha*, 770 P.2d 1180, 1183 (Ariz. Ct. App. 1989); *Metcalfe v. Waters*, 970 S.W.2d 448 (Tenn. 1998).
46 See *Industrial Risk Insurers v. Port Auth. Of N.Y. and N.J.*, 387 F. Supp. 2d 299, 311 (S.D.N.Y. 2005).
47 Pollock, supra note 28, at 22.
48 See *DeLuna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006); *Crean v. Chozick*, 714 S.W.2d 61 (Tex.Ct.App.1986).
49 See *Pessoni v. Rabkin*, 633 N.Y.S.2d 338(App. Div. 1995); See also, Restatement, supra note 2, Section 37, cmt. E.
50 Pollock, supra note 28, at 23; See, e.g., *Hendry v. Pelland*, 73 F.3d 397, 401-02(D.C. Cir. 1996); *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999); See also, Restatement, supra note 2, Section 37, cmt. E.
51 Pollock, supra note 28, at 23.
52 Id.

Internal documents that were generated in discussions as to how to best position the law firm for a threatened malpractice claim can be considered a conflict and discoverable unless the law firm seeks to withdraw from the representation or promptly seeks the client's consent to continue the representation after full disclosure and consultation.[53] In contrast, if a lawyer or law firm conducts internal communications with the firm's ethics committee or general counsel to determine the lawyer's or the firm's ethical obligations to the client, those documents might not be considered discoverable as such communications may not create any conflict between lawyer and client.[54]

V. CONCLUSION

Attorneys have a duty to promptly self report material mistakes to clients. Any delays in reporting the consequences of mistakes can exacerbate the potential significance of a malpractice claim; typically, the earlier the mistake is reported after discovery, the better.

As a practical matter, the mistake or potential malpractice will eventually be discovered, and the attorney will be subject to a legal malpractice claim anyway. In addition to the serious consequences of not reporting errors in a timely manner, attorneys lose credibility before juries, and otherwise defensible tactical errors can be viewed in a different light.

The best way to manage a mistake is to act quickly to determine whether it needs to be reported. This may entail obtaining help from outside counsel or calling ethics or risk control hotlines. Attorneys should always be aware that written communications can be discoverable at a later date.

Attorneys should always be honest and straightforward. They should not bury their head in the sand, wallow in self-pity, and ignore the problem. In addition, attorneys should never attempt to cover up the mistake or falsify documents. The best approach is to swiftly take appropriate action. Oftentimes, by honestly confronting the mistake, it can be remedied entirely or the potential damage reduced. At a minimum, by taking direct action, an attorney can confine the result of an error to just a malpractice claim.

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53 Id.
54 Id. at 23-4.

APPENDIX A

COMPLETE TEXTS OF RESTATEMENT, MODEL RULE 1.4 AND MODEL RULE 1.7

PREPARED DECEMBER 2009

The information contained herein was believed to be accurate at the time it was written and not meant to be exhaustive.
It is to be used as a starting point for additional research and, since the law changes frequently, all citations must be checked for updates.

I. CURRENT RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS

Chapter 2. The Client-Lawyer Relationship

Topic 3. Authority to Make Decisions

Section 20. A Lawyer's Duty to Inform and Consult With a Client

(**1**) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer under Sections 21-23.
(**2**) A lawyer must promptly comply with a client's reasonable requests for information.
(**3**) A lawyer must notify a client of decisions to be made by the client under Sections 21-23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[55]

II. MODEL RULE 1.4: COMMUNICATION

A) Current Model Rule 1.4: Communication

(**a**) A lawyer shall:
(**1**) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(**2**) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(**3**) keep the client reasonably informed about the status of the matter;
(**4**) promptly comply with reasonable requests for information; and
(**5**) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(**b**) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[56]

B) Pre-2002 Version Of Model Rule 1.4: Communication

(**a**) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(**b**) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. [57]

55 See American Law Institute (ALI), Restatement (Third) of the Law Governing Lawyers, Current Through August 2007, Chapter 2, Topic 3, Section 20 (REST 3d LGOVL Section 20 (2000)).
56 See American Bar Association (ABA), Center for Professional Responsibility, Model Rules of Professional Conduct.
57 Id.; Note that Model Rule 1.4 was changed in 2002 to consolidate all rules concerning communication with a client in one rule and also to identify five different aspects of the duty to communicate. See, ABA Center for Professional Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduc*t, 1982-2005 (2006).

III. CURRENT MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(**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:

(**1**) the representation of one client will be directly adverse to another client; or

(**2**) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(**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.[58]

58 Id.

APPENDIX B

SELECTED CASES, ETHICS OPINIONS AND STATUS OF ADOPTION OF MODEL RULE 1.4 CONCERNING OBLIGATIONS TO REPORT ERRORS TO CLIENTS

PREPARED DECEMBER 2009

The information contained herein was believed to be accurate at the time it was written and not meant to be exhaustive.
It is to be used as a starting point for additional research and, since the law changes frequently, all citations must be checked for updates.

State	Summary of Rule or Records Category
AL	Retains the pre-2002 version of Model Rule 1.4
AK	Retains pre-2002 version of Model Rule 1.4 and adds an insurance disclosure provision
AZ	Has adopted Current Model Rule 1.4 *Asphalt Eng'rs, Inc. v. Galusha*, 770 P.2d 1180, 1183 (Ariz. Ct. App. 1989)(Evidence of attorney's concealment of malpractice supported a verdict for punitive damages)
AR	Has adopted Current Model Rule 1.4, but adds the following language: "A lawyer shall promptly notify a client in writing of the actual or constructive receipt by the attorney of a check or other payment received from an insurance company, an opposing party, or from any other source which constitutes the payment of a settlement, judgment, or other monies to which the client is entitled"
CA	Has not adopted Model Rule 1.4 California Rule 3-500 requires a lawyer to keep "a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed" Rule 3-510 separately requires a lawyer to inform a client of settlement offers in civil matters, and offers of any kind in criminal matters *Beal Bank v. Arter & Hadden*, 167 P.3d 666 (Cal. 2007)("Attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice") *Shalant v. State Bar*, 658 P.2d 737 (Cal.1983) (Failure to notify client who had been sued) *Mayo v. State Bar*, 587 P.2d 1158 (Cal.1978) (Lawyer representing executor did not disclose lawyer's debt to estate) *Goldfisher v. Superior Court*, 183 Cal. Rptr. 609 (Cal. Ct. App. 1982)(Lawyer has absolute duty to notify a client of an error by predecessor counsel)
CO	Has adopted Current Model Rule 1.4 *Colorado Formal Ethics Op.* 113 (November 19, 2005)("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")
CT	Has adopted Current Model Rule 1.4
DC	Retains the pre-2002 version of Model Rule 1.4 and adds a provision that a lawyer "who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication" *Hendry v. Pelland*, 73 F.3d 397, 401-02(D.C. Cir. 1996)(Client did not need to prove that attorney's breach of fiduciary duty caused the client any damages)

State	Summary of Rule or Records Category
DE	Has adopted Current Model Rule 1.4 *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 617 (3d Cir.1991) (Lawyer liable for fraud damages for failure to disclose conflict of interest) (Applying Delaware, Pennsylvania and New Jersey law)
FL	Has adopted Current Model Rule 1.4
GA	Retains the pre-2002 version of Model Rule 1.4
HI	Retains the pre-2002 version of Model Rule 1.4 and requires a lawyer to inform the client when the lawyer receives a written offer of settlement or a proffered plea bargain "unless prior discussions with the client have left it clear that the proposal will be unacceptable"
ID	Has adopted Current Model Rule 1.4
IL	Has adopted Current Model Rule 1.4 *In re Ring*, 565 N.E.2d 983 (Ill. 1990) (Attorney was disciplined for failure to inform his client that client's case had been dismissed) *Ill. State Bar Ass'n, Formal Ethics Op.* 88-11 (1989)(Lawyer's duty to notify a client of an error by predecessor counsel) *DeLuna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006)(Attorney was not permitted to use statute of repose as a defense when attorney had deceived client as to the dismissal of the underlying medical malpractice matter)
IN	Has adopted Current Model Rule 1.4 *In re Hoffman*, 700 N.E. 2d 1138 (Ind. 1998) (Attorney disciplined for failing to explain adequately to client the effect of attorney's malpractice) *In re Samai*, 706 N.E.2d 146 (Ind. 1999)(Attorney suspended 18 months for failure to notify client of dismissal of underlying matter)
IA	Has adopted Current Model Rule 1.4
KS	Retains the pre-2002 version of Model Rule 1.4
KY	Retains the pre-2002 version of Model Rule 1.4
LA	Louisiana's rule is patterned on Current Model Rule 1.4, but adds a provision that a lawyer who provides financial assistance to a client must give the client written notice setting out "the terms and conditions under which such financial assistance is made, including…repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance" *Beis v. Bowers*, 649 So.2d 1094 (La. Ct. App. 1995)(No proof of damages for claim for lawyer's negligence, but claim for emotional distress allowed because lawyer had not disclosed problem to client)
MA	Retains the pre-2002 version of Model Rule 1.4
MD	Has adopted Current Model Rule 1.4 *Attorney Grievance Comm'n of Md. v. Pennington*, 876 A.2d 642 (Md. 2005)(Attorney was disciplined for failing to advise client that the client's complaint had been dismissed with prejudice due to attorney error)
ME	Has no equivalent to Model Rule 1.4, but its rules do include provisions in Rule 3.6(d) requiring a lawyer not to "counsel or assist a client in the violation of any law, rule, or order of a tribunal; but a lawyer may take appropriate steps in good faith to test the validity of any law, rule, or order of tribunal" and Rule 3.6 (e)(2) to "[p]romptly notify a client of the receipt of the client's funds, securities, or other properties" *McAlister v. Slosberg*, 658 A.2d 658 (Me 1995)(No proof of damages for claim for lawyer's negligence, but claim for emotional distress allowed because lawyer had not disclosed problem to client)

State	Summary of Rule or Records Category
MI	Retains the pre-2002 version of Model Rule 1.4 and adds the provision that a lawyer "notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains"
MN	Has adopted Current Model Rule 1.4 *Minnesota Lawyers Professional Responsibility Bd., Op.* 21, 10/2/2009. (When an attorney knows that his or her conduct may reasonably form the basis of a nonfrivolous malpractice claim by the client that materially affects the client's interests, the lawyer must inform the client about the conduct to the extent necessary to achieve each of these objectives: (1) keeping the client reasonably informed about the status of the representation; (2) permitting the client to make informed decisions regarding the representation; and (3) ensuring reasonable communication with the client about the means by which the client's objectives are to be accomplished) *Leonard v. Dorsey & Whitney*, 553 F.3d 609, 25 Law. Man. Prof. Conduct 48 (8th Cir. 2009)(A law firm does not breach a fiduciary duty by failing to notify its client in an ongoing matter that the firm may have committed malpractice, unless the continued representation created a conflict that would have warranted the firm's disqualification" *Carlson v. Fredrikson & Byron*, 475 N.W.2d 882 (Minn.Ct.App.1991) (Malpractice liability for failure to disclose conflict only when conflict required withdrawal)
MS	Retains the pre-2002 version of Model Rule 1.4
MO	Retains the pre-2002 version of Model Rule 1.4 but also includes the provision from the Current Model Rule 1.4 requiring a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law." *In re Sullivan*, 494 S.W.2d 329 (Mo.1973) (Failure to notify that charges against client had been dismissed)
MT	Has adopted Current Model Rule 1.4
NE	Has adopted Current Model Rule 1.4
NV	Has adopted Current Model Rule 1.4
NH	Has adopted Current Model Rule 1.4
NJ	Retains the pre-2002 version of Model Rule 1.4, but adds the provision from the Current Model Rule 1.4 that when a lawyer knows that a client "expects assistance not permitted by the Rules of Professional Conduct or other law" the lawyer must "advise the client of the relevant limitations on the lawyer's conduct." It also requires a lawyer to "fully inform a prospective client of how, when, and where the client may communicate with the lawyer" *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 662 A.2d 509 (N.J. 1995) (An attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney, even if that advice is against the attorney's own interests) (Note – abrogated on other grounds by *Olds v. Donnelly*, 696 A.2d 663 (N.J. 1997)) *N.J. Eth. Op* 684, 151 *N.J.L.J.* 994 (March 9, 1998) (An attorney must report a mistake to a client when malpractice "may have occurred") *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 617 (3d Cir.1991) (Lawyer liable for fraud damages for failure to disclose conflict of interest) (Applying Delaware, Pennsylvania and New Jersey law)
NM	Retains the pre-2002 version of Model Rule 1.4 *Akutagawa v. Laflin, Pick & Heer*, 126 P.3d 1138, 1143 (N.M. Ct. App. 2005)(Description of standard to allow emotional distress claim in legal malpractice action)

State	Summary of Rule or Records Category
NY	Has adopted Current Model Rule 1.4 with two additions to 1.4(a)(1) about informing the client about any information required by court rule or other law and any material developments in the matter including settlement or plea offers *New York State Ethics Op.* 734 (2000) (Generally, an attorney "has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim") *Association of the Bar of the City of New York Formal Opinion* 1995-2 (Feb. 22, 1995) (Where client has a possible malpractice claim against a legal services organization, the organization must withdraw from the representation, advise the client to get new counsel and assist the client in obtaining new counsel) *Estate of Re v. Kornstein, Veisz & Wexler*, 958 F. Supp 907 (S.D.N.Y. 1997)(The causation standard for a breach of fiduciary claim is less strict than that for a claim for malpractice negligence) *In Re Tallon*, 447 N.Y.S,.2d 50 (N.Y. App. Div. 1982) (A lawyer is obligated under rule 1.4 to promptly notify a client of the failure to act and the possible claim the client may have against the attorney) *Industrial Risk Insurers v. Port Auth. Of N.Y. and N.J.*, 387 F. Supp. 2d 299 (S.D.N.Y. 2005)(Punitive damage award may not be covered in states with a public policy forbidding a lawyer from insuring against punitive damages) *Pessoni v. Rabkin*, 633 N.Y.S.2d 338(App. Div. 1995)(Lawyer must disgorge all fees earned during course of representation, even those earned prior to conflict arose)
NC	Has adopted Current Model Rule 1.4
ND	Has adopted Current Model Rule 1.4
OH	Has adopted Current Model Rule 1.4 and adds an insurance disclosure requirement *Columbus Bar Ass'n v. Bowen*, 717 N.E. 2d 708 (Ohio 1999)(Ohio Supreme Court suspended attorney for six months who avoided client's letters and telephone calls when client's lawsuit dismissed with prejudice for failure to prosecute the action and attorney failed to inform client of dismissal for two years after disciplinary grievance filed)
OK	Has adopted Current Model Rule 1.4 *State ex rel. Oklahoma Bar Assoc. v. O'Brien*, 611 P.2d 650 (Okla.1980) (failure to tell client that client had lost trial and appeal); Annot., 80 A.L.R.3d 1240 (1977)
OR	Retains the pre-2002 version of Model Rule 1.4 *In re Knappenberger*, 337 Or. 15, 90 P.3d 614 (2004) (Discussed duty to disclose to client that lawyer may have committed malpractice and seek a waiver before proceeding) *In re Obert*, 336 Or. 640, 89 P.3d 1173 (2004) (Discussed duty to disclose to client that lawyer may have committed malpractice and seek a waiver before proceeding)
PA	Has adopted the Current Model Rule 1.4 and adds an insurance disclosure provision *Penn. Bar Assn Comm. on Legal Ethics and Prof. Resp., Informal Op,*. 97-56 (1997) (A lawyer needs only to disclose to the client the facts and consequences of the mistake and not that the client may have a malpractice action against the attorney) *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 617 (3d Cir.1991) (A lawyer liable for fraud damages for failure to disclose conflict of interest) (Applying Delaware, Pennsylvania and New Jersey law) *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1285 (Pa. 1992)(Court noted that there can be an order for the disgorgement of fees to attorneys who have breached their fiduciary duty to clients by engaging in impermissible conflicts of interest)

State	Summary of Rule or Records Category
RI	Has adopted Current Model Rule 1.4 and adds a requirement that when a lawyer undertakes to represent a client whom the lawyer believes does not fully understand the client-lawyer relationship, the lawyer "shall take reasonable steps to inform the client of the nature of the attorney-client relationship before the representations is undertaken" *R.I. Supreme Court, Formal Op.*, 94-70 91994) (Lawyer's duty to notify a client of an error by predecessor counsel)
SC	Has adopted Current Model Rule 1.4
SD	Has adopted Current Model Rule 1.4 and adds a requirement that a lawyer who does not have professional liability insurance of at least $100,000 inform the client of that fact "in every written communication with that client."
TN	Retains the pre-2002 version of Model Rule 1.4 *Metcalfe v. Waters*, 970 S.W.2d 448 (Tenn. 1998)(Punitive damage award upheld due to attorney lying about status of case that was dismissed)
TX	Retains the pre-2002 version of Model Rule 1.4 *Crean v. Chozick*, 714 S.W.2d 61 (Tex.Ct.App.1986) (Failure to disclose malpractice tolls a statute of limitations) *Deutsch v. Hoover, Bax & Slovacek*, LLP, 97 S.W.3d 179 (Tex Ct. App. 2002)(Failure to timely notify client of mistake can lead to additional potential causes of action like for breach of fiduciary) *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999)(Client need not prove that attorney's breach of fiduciary duty caused the client any damages)
UT	Has adopted Current Model Rule 1.4
VT	Retains the pre-2002 version of Model Rule 1.4
VA	Retains the pre-2002 version of Model Rule 1.4 and also requires that a lawyer inform a client of "facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter"
WA	Has adopted Current Model Rule 1.4 *In re Burtch*, 770 P.2d 174, (Wash 1989)(A lawyer's failure to notify his clients of a pending motion to dismiss or a subsequent order of dismissal for failure to prosecute constitutes a violation of his ethical duty to keep the client informed)
WV	Retains the pre-2002 version of Model Rule 1.4
WI	Has adopted Current Model Rule 1.4 *Wis Eth*. Op. 82-12. (An attorney must report a mistake or omission to a client when malpractice "may have occurred" and that the client may have a claim against him or her for such mistake or omission)
WY	Has adopted Current Model Rule 1.4 and adds a provision to subparagraph (b) to read, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, except that a lawyer appointed to act as a guardian *ad litem* shall be ultimately responsible for making decisions in the best interests of the individual"