

THE LAWYER'S DUTY TO INFORM HIS CLIENT OF HIS OWN
MALPRACTICE

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ABSTRACT

Every big-firm litigation partner has received the call from his colleague in the corporate department: "The big deal that I was working on fell apart, and now the client has been sued. Can you handle the litigation?" While this turn of events is not good news for the client, it is not necessarily bad news for the law firm, which may now be looking forward to lengthy litigation and big fees. Because of that, the litigation partner's response is usually the same—he says, "yes"—and he simply assumes that his partner was not the cause of the litigation or perhaps just ignores that possibility. In either case, he eagerly accepts his partner's offer to handle the case and merrily embarks on the litigation path. After all, getting clients out of trouble is what litigators do.

But lurking in the background is an ethical landmine that has received little attention from the courts, the academic community or the bar. If the litigator comes to believe that his corporate partner's legal work (e.g. the insertion of a poorly drafted clause into the critical contract) may have been to blame for the failure of the deal and the subsequent litigation, then the firm may have an ethical obligation to report that fact to the client. And,

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moreover, the failure to report that fact to the client, as well as the continued representation of the client in the litigation, may itself give rise to an independent claim against the firm. Remarkably, although this scenario plays out all the time at firms all over the country, little attention has been given to this issue. This is even more remarkable because, upon closer examination, the lawyer's self-reporting duty is obvious.

This Article takes the first comprehensive look at this duty. Part I explores the source of this self-reporting duty, which is well rooted in Rules 1.4 and 1.7 of the Model Rules of Professional Conduct as well as the fiduciary law governing the lawyer-client relationship. Having established the legal source of the self-reporting duty, Part II of this Article will turn to the moral and philosophical source of the duty—the notion of informed consent. Part III will then focus on the scope of the self-reporting duty. Lawyers make mistakes all the time, but under what circumstances do those mistakes require self-reporting? In addition, once the self-reporting duty arises, what precise obligations does the self-reporting duty place on the attorney? In Part IV, I explain why a failure to self-report can give rise to an independent claim for legal malpractice, as well as other significant negative consequences. These negative consequences should give lawyers an incentive to think more about their potential self-reporting obligations, and, in the appropriate circumstances, to report their errors to their clients.

INTRODUCTION

Every big-firm litigation partner has received the call from his colleague in the corporate department: “The big deal that I was working on fell apart, and now the client has been sued. Can you handle the litigation?” While this turn of events is not good news for the client, it is not necessarily bad news for the law firm, which may now be looking forward to lengthy litigation and big fees. Because of that, the litigation partner's response is usually the same—he assumes that his partner was not the cause of the litigation or perhaps just ignores that possibility and eagerly accepts his partner's offer to handle the litigation. After all, getting clients out of trouble is what litigators do, and making money is what firms do.

But lurking in the background is an ethical landmine that has received little attention from the courts, the academic community, or the bar. If the litigator senses that his corporate partner's legal work (e.g. the insertion of a poorly drafted term into the critical contract) may have been to blame for the failure of the deal and the subsequent litigation, then the firm may have an ethical obligation to report that fact to the client, and the lawyers

involved might be subjected to discipline for failing to do so.¹ And, moreover, the failure to report that fact to the client, as well as the continued representation of the client in the litigation, may itself give rise to an independent malpractice claim against the firm as well as a number of other negative consequences.² Remarkably, although this scenario plays out all the time at firms all over the country, little attention has been given to this issue. This is even more remarkable because, upon closer examination, the lawyer's self-reporting duty is obvious.

Buried in a comment of the Restatement (Third) of the Law Governing Lawyers is the clear, but neglected, statement: "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 While this unequivocal statement gives the impression that the principle is the subject of multiple reported decisions and academic commentary, in fact it is not. To the contrary, while this duty of self-reporting has been discussed in a handful of ethics opinions,⁴ a couple of court decisions,⁵ and a few bar

¹ See, e.g., *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ind. 1998).

² See *infra* Part IV.

³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000).

⁴ See, e.g., N.Y. State Bar Ass'n, Ethics Op. 734 (2000) (Because "lawyers have an obligation to keep their clients reasonably informed about [a] matter and to provide information that their clients need to make decisions relating to the representation," lawyers have an obligation to a client to disclose "the possibility that they have made a significant error or omission."); Col. Bar Ass'n, Formal Op. 113 (2005) (discussing the ethical duty of an attorney to disclose errors to clients); N.Y. City Bar Ass'n, Formal Op. 1995-2 (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.");

⁵ See *Leonard v. Dorsey & Whitney L.L.P.*, 553 F.3d 609 (8th Cir. 2009) (rejecting claim based on firm's failure to disclose that it may have committed malpractice); *Olds v. Donnelly*, 696 A.2d 633, 643 (N.J. 1997) ("The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.") (citation omitted); *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.");

journals,⁶ there has been no comprehensive academic treatment of this topic.⁷

The existence of the self-reporting duty is a significant issue. Lawyers are human, and, although they do not like to admit it, they often make mistakes. Obviously, lawyers who make mistakes that may give rise to a self-reporting duty practice all different types of law in all sorts of settings—government and private practice, inside and outside counsel, big firm and small firm, criminal and civil—but the issue raises particular concerns in big firms. One of the main reasons that lawyers join together to practice in firms with a variety of specialties and offices in far-flung locations is that they can help out a client anywhere with any problem.⁸ Being able to bail out a firm client in litigation taking place in Los Angeles as a result of a deal that fell apart in Moscow (or that arises out of tax advice on a project in Egypt, or out of estate planning in Atlanta), is the big firm's *raison d'être*. When the litigation partner in Los Angeles gets a call from his partner in Moscow, his natural response is to plunge forward with the litigation. Some of that response is entirely understandable and even admirable—he wants to get the firm's client out of trouble. But there is a dark side too—the litigation partner has a strong economic incentive to take the case because he will make money for the firm, while at the same time keeping the case out of the hands of another law firm.⁹ That economic incentive also causes the litigation partner, consciously in some cases and unconsciously in others, to assume that his corporate partner did not make a

⁶ See, e.g., Brian Pollock, *Second Chance: Surviving A Screwup*, 34 LITIG. 19, 24 (2008); Charles E. Lundberg, *Self-Reporting Malpractice or Ethics Problems*, BENCH & B. MINN., Sept. 2003.

⁷ The self-reporting duty has been touched upon in a couple of scholarly articles as seen in Daniel M. Serviss, *The Evolution of the 'Entire Controversy' Doctrine and its Enduring Effects on the Attorney-Client Relationship: What a Long Strange Trip It Has Been*, 9 SETON HALL CONST. L.J. 779 (1999) and Nancy J. Moore, *Implications of Circle Chevrolet for Attorney Malpractice and Attorney Ethics*, 28 RUTGERS L.J. 57 (1996), but it has not been given comprehensive academic treatment.

⁸ Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 675 (2005) ("Many firms have opened offices in multiple cities in an attempt to make themselves attractive to large corporations with a need for legal services in many regions of the country.") (citing MARC GALANTER & THOMAS M. PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM*, 46–50 (U. Chic. Press 1991)).

⁹ See Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1072–78 (discussing conflicts resulting from differing economic interests of lawyer and client).

mistake in the underlying transaction¹⁰ even though, given the size of today's law firms and the remarkable amount of lateral movement among firms, there is a good chance that the Los Angeles litigation partner has never even met the Moscow corporate partner and has no idea about the quality of his work. Of course, the economic incentive for the litigation partner to keep the case and overlook the possibility that the corporate partner made a mistake exists whether or not he knows the corporate partner. And no matter how good a lawyer the corporate partner is, he still could have made a critical mistake in this case.

Moreover, the self-reporting issue promises to take on even greater significance in the legal profession in the coming years for at least two reasons. First, law firms continue to grow in size and geographic reach,¹¹ and the economic pressure on law firms continues to mount.¹² In this environment, law firms no longer "own" their work since there is always a competitor ready to steal another firm's work or clients.¹³ Many commentators have lamented that in this environment, lawyers have tended to overemphasize the norm of zealous advocacy while underemphasizing their responsibilities to others and to the legal system.¹⁴ This same pressure that causes lawyers to engage in inappropriate "scorched earth" litigation tactics in the interest of impressing and keeping clients also keeps lawyers from disclosing errors to their clients. In this kind of environment, lawyers do not want to risk losing business by delivering bad news to their clients.¹⁵

¹⁰George M. Cohen, *The Multi-lawyered Problems of Professional Responsibility*, 2003 U. ILL. L. REV. 1409, 1467 (2003) ("Lawyer co-owners might also act together against the client's interests when the lawyers' interest in the firm conflicts with the client's interests, such as in disputes between the firm and client over billing or malpractice.").

¹¹Marc S. Galanter & William D. Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN L. REV. 1867, 1882 (2008) ("During the last three decades, large law firms have mushroomed in size and geographic dispersion.").

¹²*Id.*

¹³Kirkland, *supra* note 8, at 675.

¹⁴See Galanter, *supra* note 11, at 1911–12 ("Not surprisingly, as extensive qualitative field work has revealed, the ethical norm that is most widely embraced by large firm lawyers is the very one that reduces the strains in the lawyer-client relationship: zealous advocacy."); see also MODEL RULES OF PROF'L CONDUCT PREAMBLE (2007) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

¹⁵See Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 49, 49–50 (2005) ("Growing financial pressures make it increasingly difficult for lawyers to antagonize clients or supervisors by delivering unhappy messages about what legal rules and legal ethics require.").

Second, recent changes in the lawyer-as-witness rule make it possible for the law firm to continue to represent the client even when a primary witness at trial will be the transactional lawyer who drafted the questionable provision. This is a change from the old Model Code of Professional Responsibility. Under the Model Code, a lawyer could not accept a “contemplated or pending litigation if [the lawyer knew or it was] obvious that he or a lawyer in his firm ought to be called as a witness”¹⁶ Because the transactional lawyer often is a key witness in litigation that arises out of a business transaction, the Model Code created a significant barrier to the litigation staying with the same firm.¹⁷ But the Model Rules have eliminated this barrier. Under Model Rule 3.7(b), generally, “[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness”¹⁸ Thus, the amended rule only precludes the lawyer who is likely to be a witness himself from representing the client, but that disqualification is not imputed to the firm. As a result, under the new Model Rules, the litigation department may represent the client in the litigation even if the corporate partner who drafted the controversial provision is likely to be a key witness.¹⁹ Even though this rule change was made by the American Bar Association in

¹⁶MODEL CODE OF PROF’L RESPONSIBILITY DR 5-101(B) (2008–09). DR 5-102(A) also recognizes a lawyer’s duty to withdraw from the pending litigation if he or a lawyer in his firm ought to be called as a witness: “If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any shall not continue the representation in the trial”

¹⁷See Erik J. Luna, *Avoiding a “Carnival Atmosphere”*: Trial Court Discretion and the Advocate-Witness Rule, 18 WHITTIER L. REV. 447, 452 (1997).

¹⁸See MODEL RULES OF PROF’L CONDUCT R 3.7(b) (2007). The full text of the rule is: “A lawyer may act as advocate in trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.” The reference to 1.7 and 1.9 at the end of the rule means that the law firm may not serve as trial counsel if the lawyer-witness’s testimony will be adverse to the interests of the client thereby creating a conflict under Rule 1.7 or 1.9, but may serve as trial counsel if the testimony is favorable for the client. In most cases, the testimony will be favorable for the client since the law firm is interested in vindicating its original advice and keeping the client.

¹⁹*Id.*; Judith A. McMorow, *The Advocate As Witness: Understanding Context, Culture and Client*, 70 FORDHAM L. REV. 945, 958 (2001) (“Of greater practical significance, the Model Rules expressly eliminated imputed disqualification unless it was otherwise required by the conflicts rules.”).

1983, some states have only recently adopted it,²⁰ so we are likely still seeing the full impact of the rule change on this issue.

In Part I of this Article, I will explore the source of this self-reporting duty. Although the Restatement cites only one case for the legal source of the duty, the self-reporting duty is in fact well rooted in the Model Rules of Professional Conduct. Under the proper circumstances, Rule 1.4 requiring candor in lawyer-client communications and Rule 1.7 concerning conflicts both require lawyers to self-report.²¹ Having established the legal source of the self-reporting duty, Part II of this Article will turn to the moral and philosophical source of this duty—the concept of informed consent. Part III will then focus on the scope of the self-reporting duty. Lawyers make mistakes all the time, but under what circumstances do those mistakes require self-reporting? In addition, once the self-reporting duty arises, what precise obligations does the self-reporting duty place on the attorney? In Part IV, I explain why a violation of the self-reporting duty can give rise to an independent claim for legal malpractice, as well as other significant negative consequences for the lawyer who fails to self-report. These negative consequences should give lawyers the incentive to think more about their potential self-reporting obligations and, in the appropriate circumstances, to report their errors to their clients.

I. THE LEGAL SOURCE OF THE SELF-REPORTING DUTY

With its clear and precise statement—“[i]f 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”²²—the Restatement leaves the impression that this self-reporting duty is well established.²³ But digging

²⁰ See Charles H. Oates & Marie Summerlin Hamm, *New Twist for an Olde Code: Examining Virginia’s New Rules of Professional Conduct*, 13 REGENT U. L. REV. 65, 65, 101–02 (2000–2001) (discussing the implementation of the new lawyer-as-witness rule in Virginia effective January 1, 2000); Carl A. Pierce & Lucien T. Pera, *Your Ethics Roadmap*, 38 TENN. B.J. 14, 20 (Dec. 2002) (discussing the implementation of the new lawyer-as-witness rule in Tennessee effective March 1, 2003).

²¹ See Douglas R. Richmond, *Law Firm Partners As Their Brothers’ Keepers*, 96 KY. L.J. 231, 234 (2007–2008) (stating partners in a law firm have a “professional duty to reasonably ensure that their peers conform their behavior to the rules of professional conduct”). The same analysis applies to a lawyer’s duty to report himself as to a lawyer’s duty to report his partners.

²² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000).

²³ Indeed, the very fact that the concept is mentioned in the Restatement, albeit in a comment, suggests that it is well-established. Professor Charles Wolfram, a primary author of the

just a little bit deeper, it turns out that courts and commentators have said very little about this duty. The only case cited in the Restatement for this proposition is *In re Tallon*,²⁴ a two-page opinion from the New York Appellate Division in a disciplinary case. In *Tallon*, the attorney allowed the statute of limitations run on his client's claim for property damages resulting from an auto accident.²⁵ Relying on New York DR 1-102(A)(4), which provides that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation," the Appellate Court noted that "[a]n attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may have against him," and found that Attorney Tallon was subject to discipline because, *inter alia*, he had "obtained a general release [from the client] without advising her . . . of the claim she had against him for malpractice in letting the Statute of Limitations run on her property damage claim."²⁶ The *Tallon* case is one of the few reported decisions that squarely holds that an attorney has a professional duty to notify his client of his own potential malpractice.²⁷ To the extent that courts and commentators have talked about the self-reporting duty, they almost always cite *Tallon*.²⁸

Restatement, has said: "[M]y own reckoning is that this Restatement invented but very little, and was mainly concerned with documenting a legal development that had already taken place or was well underway generally in the United States. At most, the Restatement's influence will be incremental." Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II: The Modern Era*, 15 GEO J. LEGAL ETHICS 205 (2002).

²⁴ 447 N.Y.S.2d 50 (App. Div. 1982).

²⁵ *Id.* at 50.

²⁶ *Id.* at 51.

²⁷ 3 MALLEN & SMITH, LEGAL MALPRACTICE § 24:5 (ThomsonWest 2008) ("Despite moral considerations, few courts have construed civil or ethical standards to compel such disclosure in the abstract."). The Eighth Circuit recently became the first federal appeals court to directly address the issue, but the court's analysis did little to bring clarity to this area of the law. *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009). In that case, Dorsey & Whitney advised its client Miller & Schroeder, Inc. ("M & S"), an investment bank, that it need not obtain approval of certain loan documents from the National Indian Gaming Commission ("NIGC") before making loans to President R.C.-St. Regis Management Company ("President"), despite the fact that Dorsey lawyers were having an "internal debate" about the necessity of NIGC approval. *Id.* at 614. The loan closed without NIGC approval, and President subsequently failed to make payments and went bankrupt. *Id.* at 615–16. Dorsey continued to represent M & S in the ensuing litigation against President, the Indian Tribe and the finance company that had purchased a significant interest in the loan from M & S. *Id.* at 616. The litigation ended with M & S and the finance company unable to obtain full satisfaction of the unpaid loan amounts. *Id.* M & S then sued Dorsey alleging, among other things, that Dorsey should have disclosed "that it may have

Despite the dearth of direct authority requiring self-reporting, as several bar organizations and other courts have noted in dicta, the duty is well-grounded in two of the Model Rules of Professional Conduct.²⁹ The first is Rule 1.4 entitled “Communication,” which requires, in pertinent part, that “A lawyer shall keep the client reasonably informed about the status of the matter”³⁰ and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”³¹ The comments to Rule 1.4 explain that “reasonable communication between the lawyer and the client is necessary for the client effectively to participate in

committed malpractice by closing [the] loan without NIGC approval.” *Id.* at 628. The Eighth Circuit acknowledged that a lawyer has a duty to disclose a possible malpractice claim when “the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client,” but found that Dorsey’s continued representation of the client “was part of its legitimate efforts to prevent its possible error in judgment from harming [the client]; there was not a substantial risk that the [law firm’s] interests were adverse to those of [the client].” *Id.* at 629. The court did not, however, provide any meaningful analysis of why Dorsey’s conduct fell into the category of “legitimate efforts to prevent its possible error in judgment from harming” the client rather than an impermissible conflict of interest. The case therefore provides future courts and the bar with no helpful guidance in determining when the self-reporting duty arises. At the time of publication, the plaintiffs’ Petition for Rehearing En Banc was pending.

²⁸ See, e.g., Vincent R. Johnson, *‘Absolute and Perfect Candor’ to Clients*, 34 ST. MARY’S L.J. 737, 773 (2003) (citing *Tallon* for the proposition that “some authorities hold that there is a duty to inform a client of when a malpractice claim might be brought against the lawyer. . .”).

²⁹ Those that have discussed the rule have sometimes found that it arises out of Rule 1.4. See, e.g., Col. Bar Ass’n, Ethics Comm. Formal Op. 113 (2005) (concluding that a lawyer’s duty under Colorado Rule 1.4 includes a duty to tell the client if the lawyer makes an error); *Beal Bank v. Arter & Hadden*, 167 P.3d 666, 672 (Cal. 2007) (stating in dicta that “attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice”). Others have found that it arises out of Rule 1.7. See RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 24:5 (ThomsonWest 2008) (“The potential of a legal malpractice claim may create a concern of conflicting interests in an ongoing representation. That concern can require disclosure of the nature and extent of the risk of conflicting interests. When the lawyer’s interest in nondisclosure conflicts with the client’s interest in the representation, then a fiduciary duty of disclosure is implicated.”). Still others have noted that the self-reporting duty arises out of both rules. See *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ill. 1998); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney “has an ethical obligation to advise a client that he or she might have a claim against that attorney, even if such advice flies in the face of that attorney’s own interests”), *abrogated on other grounds* by *Olds v. Donnelly*, 696 A.2d 663 (N.J. 1997).

³⁰ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3) (2007).

³¹ *Id.* at R.1.4(b).

the representation.”³² The Restatement of the Law Governing Lawyers echoes this language.³³

In describing the scope of Rule 1.4, some courts have said that a lawyer owes a duty of “absolute and perfect candor” to the client,³⁴ but, as one commentator has argued, such a standard if “read literally and without qualification . . . cannot possibly be an accurate statement of an attorney’s obligations under all circumstances” because it “would require a lawyer to convey to a client every piece of data coming into the lawyer’s possession, no matter how duplicative, arcane, unreliable or insignificant.”³⁵ Rather, as reflected in the language of Rule 1.4 and the Restatement, the lawyer’s disclosure obligations are defined and limited by a reasonableness standard³⁶ and are limited by a variety of factors including “the scope of representation, materiality, client knowledge, competing obligations to others, client agreement and threatened harm to the client or others.”³⁷ That being said, there are certain times when it is proper to hold attorneys to a

³² *Id.* at R.1.4, cmt 1.

³³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000) (“(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 . . . (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 . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

³⁴ Johnson, *supra* note 28.

³⁵ *Id.* at 738–39.

³⁶ See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2007); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000) (“The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information or may express the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation. Reasonableness depends on such factors as the importance of the information or decision, the extent to which the disclosure or consultation has already occurred, the client’s sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available The lawyer may refuse to comply with unreasonable client requests for information.”).

³⁷ Johnson, *supra* note 28, at 778. In a recent article, Professor Eli Wald argues that the lawyer’s duty of communication should be strengthened and clarified by adding a materiality standard to Rule 1.4. Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 789–92 (2008).

heightened standard approaching “absolute and complete candor,” particularly when the “interests of the attorney and client are adverse.”³⁸

Whatever the precise scope of this rule, it surely can be read to require that a lawyer inform his client when the client may have a malpractice claim against him since this information is “necessary to permit the client to make informed decisions regarding the representation.”³⁹ Among the most critical decisions that the client has to make “regarding the representation” in that situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later and (2) whether to continue the current representation.⁴⁰ The client can’t make an informed decision regarding these issues without being informed about the potential claim. Indeed, in this situation, where the interests of the attorney and client may differ substantially, “a high degree of disclosure” is necessary.⁴¹ Certainly, the broad principles underlying Rule 1.4 support such a reading of the rule.⁴² The trickier question, addressed in Part III, is when exactly that duty arises, but certain attorney mistakes clearly trigger a duty to report under this rule.

The second rule that gives rise to the self-reporting duty is Rule 1.7, concerning conflicts of interests. Rule 1.7 prohibits a lawyer from representing a client in a variety of situations including when “there is a significant risk that the representation of one or more clients will be

³⁸ Johnson, *supra* note 28, at 771.

³⁹ Frances Patricia Solari, *Malpractice and Ethical Considerations*, 19 N.C. CENT. L.J. 165, 175 (1991) (recognizing that North Carolina Rule concerning the duty to “keep the client reasonably informed” imposes a self-reporting obligation on attorneys); Lundberg, *supra* note 6, at 24 (recognizing a self-reporting duty under Minnesota law since “the attorney is under a duty to disclose any material matters bearing upon the representation and must impart to the client any information which affects the client’s interests.”). *But see* Pa. Bar Ass’n Comm. On Legal Ethics & Prof. Resp., Informal Op. 97-56 (1997) (concluding that a lawyer had to inform his client that his personal injury case had been dismissed for failure to prosecute and the consequences of such a dismissal but not that the client may have a claim against him for malpractice).

⁴⁰ Solari, *supra* note 39, at 175.

⁴¹ Johnson, *supra* note 28, at 773 (recognizing the self-reporting duty as one of these instances).

⁴² Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 547 (2003) (“The second method of deriving unenumerated rights and obligations looks to the substance of the rules that are enumerated and applies the broad principles underlying those rules, extending the protections and obligations to unenumerated circumstances as well.”).

materially limited by . . . a personal interest of the lawyer.”⁴³ Comment 10 to 1.7 further explains that “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”⁴⁴ This conflict is imputed to the entire firm.⁴⁵

Once the lawyer’s conduct has given rise to a substantial malpractice claim by his client, his personal interests are adverse to his client’s.⁴⁶ At first blush, no conflict is apparent since both the lawyer and the client have an interest in obtaining a favorable outcome. But closer inspection reveals that the lawyer’s interest is not necessarily aligned with the client’s.⁴⁷ The lawyer might want to settle the litigation quickly in order to try and hide his mistake or minimize the damages available to the client in a subsequent malpractice case.⁴⁸ Even more likely, the lawyer might want to litigate the case to the end to vindicate his (or his law firm’s) original advice while the client’s interest is best served by reaching the quickest and least expensive resolution of the litigation.⁴⁹ Because of his tunnel vision, the attorney is not in a position to realistically evaluate the claim asserted against the client or to give independent legal advice that is in the best interest of the client. Rather, the conflicted lawyer becomes fixated on vindicating his or his firm’s own position instead of acting in the best interests of the client. Indeed, one of the comments to this rule makes this clear: “If the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”⁵⁰

In addition to these two rules of professional conduct, the self-reporting duty also flows naturally from the requirement recognized by some courts that an attorney advise his client that the client has a viable malpractice action against the attorney’s predecessor. One California court expressed this duty: “[A] lawyer has the absolute duty (1) to inform a client of the

⁴³ MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2007).

⁴⁴ *Id.* at R.1.7, cmt. 10.

⁴⁵ *Id.* at R.1.10.

⁴⁶ Brian Pollock, *Second Chance: Surviving a Screwup*, 34 LITIG. 19, 21 (Winter 2008).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (2004). Frances Solari, *Malpractice and Ethical Considerations*, 19 N.C. CENT. L.J. 165, 180 (1991) (“Once it has become apparent that a client may have a malpractice claim against the attorney, the attorney clearly has a stake in the outcome of the case, and the lawyer’s representation ‘may be materially limited . . . by his own interests’”).

existence of a cause of action against any predecessor (2) to vigorously pursue such action and (3) to manage it with complete disregard to any personal embarrassment, benefit or interests.”⁵¹ If a successor attorney has this obligation to the client, there is no reason that the attorney who actually committed the error shouldn’t have a self-reporting duty. Indeed, there is arguably a stronger argument for imposing this duty on the attorney who committed the error in order to prevent that attorney from continuing a representation in which he is conflicted.

These Model Rules of Professional Conduct derive from the common law of fiduciary relationships, and that legal notion of lawyer as fiduciary further compels the conclusion that lawyers—who are the “quintessential fiduciary”⁵²—must report their errors to their clients. The fiduciary concept originated in the English chancery courts in the laws of trust and agency.⁵³ “The law defines a fiduciary as a person entrusted with power or property to be used for the benefit of another and legally held to the highest standard of conduct.”⁵⁴ A lawyer, like all fiduciaries, “must exercise the utmost good faith in his dealings” with the client, “make full and honest disclosure of material facts and refrain from taking any advantage of that party.”⁵⁵ In the

⁵¹Goldfisher v. Superior Court, 183 Cal. Rptr. 609, 615 n.2 (Cal. Ct. App. 1982); see also Ill. State Bar Ass’n, Formal Op. 88–11 (1989); R.I. Supreme Court, Formal Op. 94–70 (1994); Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1203 (1988) (noting an appellate lawyer representing a criminal defendant on appeal may have an ethical obligation to inform the defendant of the right to file a malpractice action against the trial lawyer; J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 687 n.44 (1989) (“The MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(a)(3) (1980) instructs the attorney not to prejudice the client during the course of the professional relationship. Not disclosing the prior attorney’s malpractice could certainly prejudice the client. The Model Rules, however, have no exact counterpart; the closest provision is rule 1.3, requiring diligence on the part of the attorney.”) (citation omitted).

⁵²Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000’s Revision of Model Rule 1.5*, U. ILL. L. REV. 1181, 1191 (2003); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1 (West Publishing Co. 1986) (“[T]he designation of ‘fiduciary’ . . . surely attaches to the [attorney-client] relationship.”); Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell As Sweet*, 34 WAKE FOREST L. REV. 1137, 1153 (“It is without question that lawyers are fiduciaries to their clients.”).

⁵³Brickman, *supra* note 52, at 1186–87; Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 243 (1995).

⁵⁴Rodwin, *supra* note 53, at 243.

⁵⁵Brickman, *supra* note 52, at 1184.

specific context of the lawyer-client relationship, a lawyer owes the client the “‘5C’ fiduciary duties”—“client control [over the representation], communication, competence, confidentiality, and conflict of interest resolution,”⁵⁶ all of which are memorialized in the Model Rules of Professional Conduct.⁵⁷

The law imposes these fiduciary duties—and the “highest standard of conduct”—on lawyers because of their special training, knowledge and expertise.⁵⁸ That knowledge and expertise puts the lawyer “in a position to exert undue power and influence” over the client.⁵⁹ As the expert on the law, the lawyer is in the best position to know when a mistake was made and the significance of that mistake. Indeed, if the client does not tell the lawyer, there is a chance that the client might never find out, since frequently clients “cannot effectively monitor the [lawyer’s] performance.”⁶⁰ The self-reporting duty is therefore compelled by the fiduciary nature of the attorney-client relationship.

Having established that this duty is so clear under the rules and the law of fiduciary relationships, the question is why there has been so little discussion of the issue by courts and commentators. One possibility is that lawyers are simply unaware of the duty.⁶¹ A more sinister explanation is

⁵⁶SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* 75 (Aspen 2008) (2004); *see also In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) (stating lawyers have the “duty to deal fairly, honestly and with undivided loyalty [that] superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the client’s interests over the lawyer’s”); Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 6 n.21 (1993) (noting lawyers’ fiduciary duties to clients include “maintaining confidentiality; maintaining undivided loyalty; avoiding conflicts of interest; operating competently; presenting information and advice honestly and freely; acting fairly; and safeguarding client property”).

⁵⁷See MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.2, 1.4, 1.6, 1.7, 1.8 (2004).

⁵⁸WOLFRAM, *supra* note 52, at 145–46 (discussing lawyers’ “special skills and knowledge not generally shared by people and which it would be uneconomic for most people who are not themselves lawyers to attempt to acquire”).

⁵⁹Brickman, *supra* note 52, at 1185.

⁶⁰Rodwin, *supra* note 53, at 244.

⁶¹Daniel M. Serviss, *The Evolution of the “Entire Controversy” Doctrine and Its Enduring Effects on the Attorney-Client Relationship: What a Long Strange Trip It Has Been*, 9 SETON HALL CONST. L.J. 779, 781 (1999) (noting the obligation to advise a client of her malpractice “perhaps eludes many practicing attorneys”).

that a lawyer's natural reaction is to hide his mistakes from his client.⁶² In a well-known and controversial 1990 article entitled "Lying to Clients,"⁶³ Professor Lisa Lerman interviewed 20 practicing attorneys and concluded, based on those interviews that "[l]awyers deceive their clients more than is generally acknowledged by the ethics code or by the bar."⁶⁴ Consistent with the academic literature on the changing nature of the legal profession, Professor Lerman concluded, based on the interviews, that "lawyers most frequently deceive their clients for economic reasons."⁶⁵ Professor Lerman found that: "One of the most common reasons that lawyers deceive clients is to avoid having to disclose their mistakes."⁶⁶ While sometimes these mistakes are minor, Professor Lerman concluded: "The more serious the error or oversight, the greater the incentive to conceal it."⁶⁷ "Some lawyers believe that if the errors can be fixed they need not tell the client about them."⁶⁸

Perhaps the answer lies somewhere in between these two extremes. The lawyer's natural (and human) inclination is to assume that his or his partner's work was competent and was not the cause of the dispute that has surfaced. The lawyer is also driven by his own economic interests to want to take the case and certainly has no interest in or incentive to scrutinize the previous work done by the firm.⁶⁹

II. THE MORAL AND PHILOSOPHICAL SOURCE: INFORMED CONSENT

The self-reporting duty finds a moral and ethical basis in the concept of informed consent—a concept which is "deeply ingrained in the American culture,"⁷⁰ though, as set forth below, it is not a perfect fit. The concept of informed consent in the attorney-client relationship derives from the

⁶²Steven Wechsler, *Professional Responsibility*, 52 SYRACUSE L. REV. 563, 610 (2002) ("The natural human reaction of a lawyer who makes a serious mistake in his or her representation of a client is to hide that embarrassing fact, while trying to correct the problem.").

⁶³Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

⁶⁴*Id.* at 663 (criticism of Lerman's article by Spaeth).

⁶⁵*Id.* at 705.

⁶⁶*Id.* at 725.

⁶⁷*Id.* at 727.

⁶⁸*Id.*

⁶⁹See Galanter & Henderson, *supra* note 11, at 1882.

⁷⁰Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 781 (1999).

doctrine of informed consent in the field of medical ethics and the relationship between the doctor and patient.⁷¹ In this section, I will first describe the concept of informed consent in the doctor-patient relationship. I will then discuss the concept of informed consent in the attorney-client relationship. Finally, I will discuss how self-reporting is rooted in the concept of informed consent.

In the relationship between physician and patient, the doctrine of informed consent developed primarily as a protection for the patient against “unpermitted medical intrusion.”⁷² Justice Cardozo provided the classic formulation of this justification: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body.”⁷³ A patient who does not give informed consent to a specific medical procedure should be able to obtain damages under tort law, traditionally under a battery theory (i.e. unwanted touching),⁷⁴ and for negligence under modern law.⁷⁵ In other words, the “current doctrine compels physicians to disclose information sufficient to allow patients to make voluntary, knowledgeable choices about their care,”⁷⁶ and if the doctor does obtain informed consent from the patient then the doctor will not be liable for battery.⁷⁷ Beyond the legal protection that the doctrine provides to patients, medical ethicists recognize informed consent as a

⁷¹ See *infra* pp. 112–13.

⁷² Dayna Bowen Matthew, *Race Religion and Informed Consent—Lessons from Social Science*, 36 J.L. MED. & ETHICS 150, 152 (2008); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 44–48 (1979); Nolan-Haley, *supra* note 70, at 782 (“The literature on informed consent in medical decisionmaking is voluminous.”) (collecting authorities).

⁷³ *Scholoendorff v. Soc’y of N.Y. Hosp.*, 211 N.Y. 125, 129 (1914) *superseded by statute*, N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1975) *as recognized in* *Retkwa v. Orentreich*, 584 N.Y.S.2d 710 (N.Y. Sup. Ct. 1992).

⁷⁴ Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 311 (1979) (collecting cases); Matthew, *supra* note 72, at 152.

⁷⁵ Nolan-Haley, *supra* note 70, at 782 (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 190 (5th ed. 1984)).

⁷⁶ Matthew, *supra* note 72, at 152; Nolan-Haley, *supra* note 70, at 781 (“In those transactions where informed consent is required, the legal doctrine requires that individuals who give consent be competent, informed about the particular intervention, and consent voluntarily.”).

⁷⁷ Matthew, *supra* note 72, at 152.

powerful moral and ethical value that “protect[s] patient dignity and autonomy.”⁷⁸

Inspired by the informed consent doctrine in the medical field, in the 1970s and 1980s, commentators in the legal ethics field began to discuss and advocate for a version of the informed consent doctrine in the attorney-client relationship.⁷⁹ Traditionally, attorneys had enjoyed “decisionmaking power far beyond that of an ordinary agent.”⁸⁰ Indeed, the first set of ethical rules—David Hoffman’s *Fifty Resolutions in Regard to Professional Deportment*—described lawyers as “fatherly guardians of a system laden with moral questions beyond their clients’ authority.”⁸¹ In this patronizing view of the attorney-client relationship, the client’s role was to blindly follow the lawyer’s advice in all aspects of the representation. The goal of the informed consent movement was to continue the movement away from that model and to expand the client’s role in making decisions concerning the representation.⁸² “Put most simply, client informed consent requires that clients, not lawyers, are to make the most significant decisions in their cases.”⁸³

In her important 1979 article, “Informed Consent in the Practice of Law,”⁸⁴ Professor Susan Martyn argued in favor of a doctrine of informed consent in the attorney-client relationship that “imposes a fiduciary duty on the attorney to inform his client of all relevant facts and potential consequences and to obtain the full understanding consent of the client to

⁷⁸ *Id.*; Nolan-Haley, *supra* note 70, at 781 (“Informed consent is the foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity.”); *see also* Troy E. Elder, *Poor Clients, Informed Consent and the Ethics of Rejection*, 20 GEO. J. LEGAL ETHICS 989, 1006 (2007) (describing the “two related, and slightly overlapping concepts” of informed consent—“legal” informed consent and “ethical” informed consent).

⁷⁹ *See, e.g.*, Elder, *supra* note 78, at 1004; Susan R. Martyn, *supra* note 74, at 307; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Gary A. Munneke & Theresa E. Loscalzo, *The Lawyer’s Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391, 401 (1989); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336 (1987).

⁸⁰ Maute, *supra* note 9, at 1053.

⁸¹ *Id.*

⁸² Spiegel, *supra* note 72, at 140.

⁸³ Elder, *supra* note 78, at 1005.

⁸⁴ Martyn, *supra* note 74, at 307.

the legal solution proposed.”⁸⁵ Professor Martyn went on to identify the “philosophical premise of the doctrine of informed consent,” much of which, she noted, had already been analyzed in the field of medical ethics.⁸⁶ First, imposing an informed consent requirement on attorneys would support clients’ individual autonomy: “Citizens have the right to receive information regarding their legal rights so that they can exercise these rights effectively.”⁸⁷ Second, the doctrine of informed consent respects clients’ human dignity by treating them as an equal in the lawyer-client relationship and, moreover, acknowledging that the human is “more than a reactive being” but rather has the “capacity to change in response to an environment that encourages the innate capability of each person.”⁸⁸

The legal doctrine of informed consent has now achieved “doctrinal status”⁸⁹ and has been enshrined in the Model Rules of Professional Conduct; indeed, the rules now require informed consent approximately a dozen times,⁹⁰ and the term “informed consent” is itself defined along with numerous other concepts critical to the law governing lawyers in Rule 1.0.⁹¹ The Rules define “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁹²

⁸⁵ *Id.* at 310. Professor Mark Spiegel wrote another seminal article advocating the adoption of informed consent in the lawyer-client relationship. *See* Spiegel, *supra* note 72, at 41; *see also* Nolan-Haley, *supra* note 70, at 785 (“The foundational analysis of an informed consent principle in the lawyer-client relationship is rooted in the lawyer’s professional obligation to inform clients of relevant information and in the client’s autonomy interest in participatory decisionmaking.”).

⁸⁶ Martyn, *supra* note 74, at 311.

⁸⁷ *Id.* at 312.

⁸⁸ *Id.* at 313. Professor Martyn also recognized utilitarian benefits from imposing an informed consent requirement on attorneys.

⁸⁹ Elder, *supra* note 78, at 1004; *see also* Maute, *supra* note 9, at 1052 (“[T]he regulatory and ethical framework created by the Model Rules supports a new joint venture model for allocation of authority between client and lawyer. Under this new model, the client is principal with presumptive authority over the objectives of the representation, and the lawyer is principal with presumptive authority over the means by which those objectives are pursued.”).

⁹⁰ *See* MODEL CODE OF PROF’L RESPONSIBILITY R. 1.5(c), 1.5(e), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.8(b), 1.8(f)(1), 1.9(a)(b), 1.11(a)(2), 1.11(d)(2), 1.12(a), 1.18 (2004); *see also* Wald, *supra* note 37, at 760.

⁹¹ *See* MODEL RULES OF PROF’L CONDUCT R. 1.0 (2004).

⁹² MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2004).

As a moral and philosophical norm, the doctrine has also continued to gain support,⁹³ and the self-reporting duty is rooted in this norm, though the fit is not perfect. Informing the client that the lawyer made an error respects the client's autonomous right to direct the lawyer-client relationship, and "to receive information regarding [his] legal rights so that he can exercise these rights effectively."⁹⁴ In addition, informing the client that the lawyer made a mistake also respects the client's human dignity by acknowledging the client's equal standing in the lawyer-client relationship.⁹⁵

While the self-reporting duty honors these principles of client autonomy and dignity, the self-reporting duty does not fit precisely with the notion of informed consent. The whole notion of informed consent is that the doctor or lawyer must obtain informed consent from the patient or client before the professional embarks on any significant course of conduct. On the one hand, this is consistent with the part of the self-reporting duty aimed at obtaining client consent to the continued representation to avoid violating Rule 1.7.⁹⁶ But, as discussed above, the self-reporting duty is also aimed at disclosing past errors in order to avoid violating Rule 1.4.⁹⁷ The analogy to the informed consent doctrine is thus weaker with respect to this part of the self-reporting duty.

III. THE SCOPE OF THE SELF-REPORTING DUTY

Having determined that this self-reporting duty is well rooted in the rules of professional conduct and the moral and ethical values inherent in the notion of informed consent, this section explores the scope of this duty in three respects. First, what precise conduct gives rise to the self-reporting duty? In other words, under what circumstances must conduct be reported to the client? Second, once a lawyer is under an obligation to self-report,

⁹³ See Nolan-Haley, *supra* note 70; Elder, *supra* note 78.

⁹⁴ Martyn, *supra* note 74, at 312.

⁹⁵ *Id.* at 313. Professor Martyn also recognized utilitarian benefits from imposing an informed consent requirement on attorneys. First, it would act "as a safeguard against fraud, duress, and subsequent client dissatisfaction." *Id.* Second, the doctrine of informed consent would encourage active participation by the client which, as one well-known empirical analysis demonstrated, leads to better results for the client. *Id.* (citing DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 61 (Russell Sage Foundation 1974)).

⁹⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004).

⁹⁷ *Id.*

what exactly should he do? Third, can the attorney who thinks he might have a self-reporting duty consult with another attorney to try to determine whether he should self-report to the client?

A. *What conduct gives rise to the self-reporting duty?*

As noted in the Introduction, the Restatement requires self-reporting, but the Restatement's formulation of that duty is unsatisfactory. In this subsection, I will first discuss the problems with the Restatement and then propose a different standard.

The problem with the Restatement's formulation of the rule—and a mistake echoed by several commentators who cite to the Restatement—is that it does not require reporting until far too late. The Restatement provides that “[i]f 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.”⁹⁸ Thus, the Restatement requires that the client actually have a malpractice claim against the lawyer before the lawyer has a duty to report that malpractice claim to the client. Echoing the Restatement, one commentator has stated:

If malpractice has clearly been committed, defined as a breach of professional duty proximately causing the client damages, an attorney must disclose, and must do so immediately. If a breach of professional duty has been committed, which has not yet resulted in damages to the client but is sure to cause damages to the client, an attorney must disclose. If a breach of professional duty has been committed, however, which has not yet resulted in damages to the client, nor is it determinable whether damages will be incurred by the client, an attorney remains under no obligation to disclose.⁹⁹

⁹⁸RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000).

⁹⁹Serviss, *supra* note 7, at 806. Similarly, other commentators have taken the same approach. One stated: “[I]f it might reasonably be contended that malpractice has been committed—that is the facts might support a finding of duty, breach, causation and damage—the attorneys must fully inform the client. . . .” William H. Fortune & Dulaney O’Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 635 (1994). See also N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. No. 734 (Nov. 11, 2000) (“[W]hether 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

The problem with these formulations is that they do not require reporting until far too late. A malpractice claim requires duty, breach, causation and damages,¹⁰⁰ but it can often take a long time to determine if an attorney's error will actually cause damages. Returning again to the example of the "deal that fell apart" used in the Introduction, let us assume that the corporate partner is responsible for a poorly drafted clause in a contract that becomes the subject of litigation. Until the client actually loses the litigation—which can often take years—the client does not have a malpractice claim against the firm because the client has not actually suffered any damages as a result of the poorly drafted contract clause.¹⁰¹ Since there is no substantial malpractice claim until the litigation results in a verdict against the client, under the Restatement's formulation there is also no duty to report that malpractice until after the verdict.

The central problem with the Restatement, then, is with timing. The self-reporting duty must arise much earlier and certainly by the time that the error may lead to a substantial malpractice claim against the attorney, which in most cases will be when the mistake was made.¹⁰² It is at that time that the client needs information to determine how to proceed with the current representation and with any potential malpractice claim.

The next question, then, is which mistakes must get reported? As an initial matter, there must be some potential malpractice to report. Thus, in the scenario outlined in the Introduction—the corporate partner who calls in his litigation partner to represent the client in litigation arising out of a deal that fell apart—no duty to self-report arises if the litigation partner has no

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

¹⁰⁰See, e.g., *Hughes v. Consol-Pa. Coal Co.*, 945 F.2d 594, 616–17 (3d Cir. 1991) ("To establish legal malpractice under Pennsylvania law, plaintiffs must show three elements: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) the attorney's negligence proximately caused damage to the client."); *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp.2d 585, 608 (N.D. Iowa 2003) ("In a legal malpractice case, the plaintiff must demonstrate: (1) the existence of an attorney client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual injury, loss, or damage").

¹⁰¹*Hughes*, 945 F.2d at 616–17.

¹⁰²The decision in *In re Tallon*, which is cited by the Restatement and discussed above, captures the essence of this standard: "An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him." 447 N.Y.S.2d 50, 51 (App. Div. 1982) (emphasis added).

reason to believe that the work of his corporate partner had anything to do with the deal falling apart. Thus, it is not the case that every time a litigation partner gets a call from one of his partners in another department, that alarm bells should go off in his head. While he should be on the lookout for evidence that his partner could be to blame, if there is no reason to believe that he is, then he (and his firm) should have no qualms about charging ahead with representing the client in the ensuing litigation.

Second, the self-reporting duty only arises if the lawyer's mistake is material. All professionals—even lawyers (or maybe especially lawyers)—make mistakes sometimes, but few would argue that every single mistake must be reported to the client. Some mistakes clearly should not require reporting while others should. For example, if a lawyer realizes that a brief he filed with the court contains a typo, surely the lawyer is not under an ethical obligation to report that typo to the client.¹⁰³ Similarly, if the lawyer can rectify the mistake or the mistake has no significant consequences for the client, then there is nothing to report and no conflict for the lawyer to worry about.¹⁰⁴ By contrast, if a lawyer fails to file his client's complaint in time to meet the statute of limitations, few would argue that the lawyer should not report this mistake to the client.¹⁰⁵

What distinguishes the first two situations from the third? The former inflicts no material harm on the client while the latter does and could form the basis of a malpractice claim against the lawyer. Materiality is a familiar concept in the law arising in such diverse contexts as fraud,¹⁰⁶ criminal

¹⁰³ Pollock, *supra* note 6, at 20–21 (“Not every mistake by a lawyer, however, will create a conflict of interest If a mistake can be corrected (*e.g.*, Federal Rule of Civil Procedure 6(b) permits blown deadlines to be extended upon a showing of ‘excusable neglect’) or has no meaningful consequences for the client (*e.g.*, the loss of a duplicative claim or defendant), no conflict of interest exists between lawyer and client because their interests do not diverge.”). Although the lawyer may not be under an obligation to report such a minor error to the client, he should not bill the client for the time spent fixing the mistake.

¹⁰⁴ *Id.*

¹⁰⁵ See generally Attorney Grievance Comm’n of Md. v. Pennington, 876 A.2d 642 (Md. 2005) (holding a sanction of disbarment is warranted when the attorney’s conduct violated the Rules of Professional Conduct, which require the client be informed about status of case).

¹⁰⁶ See generally Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017 (2003) (exploring the role of materiality in fraud cases).

procedure,¹⁰⁷ federal securities law,¹⁰⁸ and health care law.¹⁰⁹ The gist of materiality in these different contexts is much the same, however. In the case of fraud, a misrepresentation must generally be “material” in order for the fraud to be actionable. The Restatement (Second) of Torts provides that a misrepresentation is material if “a reasonable man would attach importance to [it] . . . in determining his choice of action”¹¹⁰ In criminal cases, prosecutors have a duty to disclose “material” exculpatory evidence.¹¹¹ The United States Supreme Court has said that evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,”¹¹² and further that a reasonable probability exists if the evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”¹¹³ As for the federal securities laws, they generally prohibit insiders from trading on “material” inside information.¹¹⁴ Materiality in this context turns on the likelihood that a reasonable investor would consider particular information to be important in making investment decisions.¹¹⁵ Finally, in the health care field, doctors face liability if they do not disclose “material” risks to their patients. Risks are material “when a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance to the risk.”¹¹⁶

In a recent article, Professor Eli Wald “propose[d] a new communications regime that takes clients seriously by mandating disclosure

¹⁰⁷ See e.g. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

¹⁰⁸ See generally Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. L. REV. 1131 (2003) (discussing materiality under the Securities Exchange Act as it pertains to insider trading).

¹⁰⁹ *Canterbury v. Spence*, 464 F.2d 772, 786–87 (D.C. Cir. 1972).

¹¹⁰ RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977).

¹¹¹ *Brady*, 373 U.S. at 87.

¹¹² *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¹¹³ *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

¹¹⁴ See *Chiarella v. United States*, 445 U.S. 222, 226–30 (1980).

¹¹⁵ See *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

¹¹⁶ *Canterbury*, 464 F.2d at 787; see also, Susan R. Martyn and Lawrence J. Fox, *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility*, Second Edition, at 84.

of all material information to clients.”¹¹⁷ Drawing on the materiality standard in other contexts, Professor Wald argues that a lawyer must “reveal all information that a reasonable client would attach importance to in determining the objectives of the representation”¹¹⁸ and proposes a revised Rule 1.4 that would require that, among other things, a lawyer “promptly inform the client of any material information relating to the representation.”¹¹⁹ Professor Wald further proposes additional comments to his revised Rule 1.4 that flesh out the meaning of materiality, and one of those comments is directly relevant to the self-reporting duty:

Information may become material depending on developments relating to the representation of a client. For example, the fact that a lawyer made a mistake in representing a client will ordinarily not be material. If the mistake, however, has consequences that materially affect the client’s matter, the fact of the mistake becomes material, and must be disclosed to the client. Moreover, such a development also makes it mandatory to disclose to the client that the client may have a malpractice cause of action against the attorney.¹²⁰

Applying this understanding of materiality to the issue addressed in this Article, the self-reporting duty should arise when the error is one that a reasonable client would find significant in making decisions about (1) the lawyer-client relationship and (2) the continued representation by the lawyer or law firm. As applied to the self-reporting duty, materiality comes down primarily to two things—how bad was the mistake and how much harm did it cause.¹²¹

Defining materiality in part by reference to the amount of harm the mistake causes will save the lawyer from having to report errors that, while blatant, are easily and quickly fixed. For example, if a lawyer is reducing a

¹¹⁷ Wald, *supra* note 37, at 750.

¹¹⁸ *Id.* at 781.

¹¹⁹ *Id.* at 790.

¹²⁰ *Id.* at 791.

¹²¹ Pollock, *supra* note 6, at 21 (“How clear cut is it that the lawyer was negligent? Can the error be remedied without harm to the client? How severe are the potential consequences of the mistake for the client? These factors boil down to the same ultimate question: What is the likelihood of a substantial malpractice claim against the lawyer as a result of the mistake in question?”).

parties' business arrangement to writing and puts in the wrong price term in the contract, the drafting lawyer will not have to inform his client about the error if the lawyer on the other side recognizes the drafting error and allows the lawyer to correct that mistake. In other words, the materiality standard recognizes the principal of "no harm, no foul."¹²²

Of course, figuring out what is material for purposes of the self-reporting duty is not easy, and lawyers will have to make difficult judgment calls. Materiality is "context- and fact-specific," and applying it is a "daunting task."¹²³ Another helpful guidepost for the lawyer in determining materiality is the lawyer's responsibility to his malpractice carrier. Once the lawyer has decided to put his malpractice carrier on notice of a possible claim then reporting to the client is a necessity. The language of a typical malpractice insurance provision tracks the standard for self-reporting discussed in this Article:

Upon the insured's becoming aware of *any act, error or omission which could reasonably be expected to be the basis of a claim or suit covered hereby*, written notice shall be given by or on behalf of the insured to the Company . . . as soon as practicable . . . together with the fullest information obtainable.¹²⁴

If a lawyer becomes aware of an act, error or omission which could reasonably be expected to be the basis of a legal malpractice claim, then the next call must be to the client.¹²⁵

¹²²The comments to the Model Rules explicitly recognize that a lawyer "may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication," though the same comment says that a "lawyer may not withhold information to serve the lawyer's own interest." MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 7 (2007).

¹²³See Wald, *supra* note 37, at 783 ("The application of the materiality standard is, by definition, context- and fact-specific and might be a daunting task."). Many scholars have criticized the imprecision of the materiality standard in the securities field. See, e.g., Yvonne Ching Ling Lee, *The Elusive Concept of 'Materiality' Under U.S. Federal Securities Laws*, 40 WILLAMETTE L. REV. 661 (2004).

¹²⁴William E. Wright, *Attorneys As Defendants*, 48 Prac. Law. 35, 36 (Sept. 2002) (emphasis added).

¹²⁵Solari, *supra* note 39, at 189 ("After the first call is placed to the liability insurance carrier, notify the client of the error in writing."). In order to be sure that any malpractice is covered by insurance, however, the lawyer should report to the insurance carrier first. Lundberg, *supra* note

Finally, in assessing his obligation to self-report, a lawyer should keep in mind that, given the fiduciary nature of the attorney-client relationship and the lawyer's superior knowledge and expertise, courts are likely to rule in favor of clients in borderline cases as they do consistently in the law governing lawyers. For example, in considering whether an attorney-client relationship has been formed, which turns, in part on whether the potential client "reasonably relies on the lawyer to provide the services"¹²⁶ the Restatement teaches that the benefit of the doubt will go to the client: "In appraising whether the person's reliance was reasonable, courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to rely on them."¹²⁷

As another example, courts also tend to favor the client in cases judging whether a client conflict exists. Rule 1.9(c)(1) prohibits "a lawyer who has formerly represented a client in a matter . . . [from using confidential] information relating to the representation to the disadvantage of the former client."¹²⁸ In *Kanaga v. Gannett Co.*,¹²⁹ the court found that the lawyer had a conflict even though the client had "not delineated an exact dialogue which could be deemed confidential."¹³⁰ It was enough for the client to "demonstrate that such [confidential information] could have been acquired," which the former client had demonstrated.¹³¹

In short, a lawyer who is considering whether a particular error is sufficiently material to trigger his self-reporting duty should err on the side of reporting since courts are likely to give clients the benefit of the doubt.

B. What does the self-reporting duty require?

Having determined when the self-reporting duty arises, the next question is what exactly the attorney has to do to satisfy his legal and

6, at 24 ("[B]y the time a lawyer is considering reporting a potential malpractice problem to the client, there is *already* an arguable legal duty to report it to the malpractice carrier.").

¹²⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (1)(b) (2000).

¹²⁷ *Id.* § 14 cmt. e; *see also* *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

¹²⁸ MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2007).

¹²⁹ No. 92C-12-182, 1993 WL 485926 at *3 (Del. Super. Ct. Oct. 21, 1993), *aff'd in part, rev'd in part*, 750 A.2d 1174 (Del. 2000)).

¹³⁰ *Id.*

¹³¹ *Id.*

ethical obligations. Analytically, it is necessary to separate out the lawyer's obligations into two separate issues: (1) what are the lawyer's obligations with respect to the potential malpractice claim and (2) what are the lawyer's obligations with respect to the current case. This subsection addresses these issues in that order.

With respect to the potential malpractice claim, the lawyer should approach his communication with the client as if the client is an unrepresented person because with respect to that malpractice claim the client is unrepresented. Rule 4.3—"Dealing with Unrepresented Persons"—therefore must guide the lawyer's conduct. This rule provides two critical directives applicable to this situation. First, the lawyer should not "state or imply that the lawyer is disinterested."¹³² The lawyer does have an interest as a potential defendant in a malpractice action, and the lawyer needs to be clear that the lawyer and client are adverse when it comes to that potential malpractice claim. Second, because the interests of the lawyer and client are in conflict, the "lawyer shall not give legal advice" to the client concerning the potential malpractice claim "other than the advice to secure counsel."¹³³ A separate and complementary ethics rule—Rule 1.8(h)—makes it clear that the lawyer should not try to settle the malpractice claim with the client without first advising the client in writing that he should seek independent representation.¹³⁴ Thus, the single most important thing that the lawyer must do in his communication with the client is to advise him to seek independent legal advice on the situation since his own independent judgment is compromised.¹³⁵

As for the lawyer's obligations with respect to the current representation, the critical issue for the lawyer to understand is that the

¹³²MODEL RULES OF PROF'L CONDUCT R. 4.3 (2007).

¹³³*Id.*

¹³⁴*See id.* at R. 1.8(h); *see also* In re Carson, 991 P.2d 896, 903 (Kan. 1999) (attorney disciplined for "settling a claim for malpractice liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate"). Attorney Grievance Comm'n of Md. v. Pennington, 876 A.2d 642, 646 (Md. 2005) (under Maryland Rule of Professional Conduct 1.8(h), attorney's payment of "\$10,000 out of her own personal funds" to client as purported settlement of underlying claim that had in fact been dismissed due to attorney error was improper).

¹³⁵William H. Fortune & Dulaney O'Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 635 (1994) ("[I]f it might reasonably be contended that malpractice has been committed—that is the facts might support a finding of duty, breach, causation, and damage—the attorneys must fully inform the client and suggest that the client confer with independent counsel.").

potential malpractice claim threatens his objectivity. In the attorney-client relationship, the lawyer has a duty to “exercise independent professional judgment,”¹³⁶ and the lawyer must recognize that in this situation, his independent professional judgment may be compromised. As discussed in Part II, the lawyer’s interest in either hiding his mistake or vindicating his (or his firm’s) original advice may compromise his duty to exercise independent professional judgment in the best interests of the client by, for example, focusing solely on demonstrating that the initial advice was proper to the exclusion of other possible litigation strategies.¹³⁷

Because of this dynamic, the lawyer and client are in conflict under Rule 1.7 since there is a “significant risk that the representation . . . will be materially limited” by the lawyer’s personal interest in the case.¹³⁸ But, can the lawyer continue with the representation despite the conflict? Under Rule 1.7(b), some conflicts are consentable—i.e. the lawyer may undertake or continue the representation despite the existence of the conflict—while others are not. Rule 1.7(b) provides that a lawyer may represent a client despite the existence of a conflict of interest 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

¹³⁶MODEL RULES OF PROF’L CONDUCT 2.1 (2007). Several other model rules of professional conduct emphasize the importance of a lawyer’s exercise of independent professional judgment. *See, e.g.* MODEL RULES OF PROF’L CONDUCT 1.8(a)(2) (requiring a lawyer who wishes to enter into a business transaction with a client to advise the client in writing of the desirability of seeking independent legal advice); *see also* MODEL RULES OF PROF’L CONDUCT 1.8(f)(2) (providing that a lawyer “shall not accept compensation for representing a client from on other than the client unless . . . there is no interference with the lawyer’s independence of professional judgment”); *see also* MODEL RULES OF PROF’L CONDUCT 1.8(h)(2) (prohibiting a lawyer from settling “a claim or potential claim for [malpractice] 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.”).

¹³⁷*See supra* Part II.

¹³⁸MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2).

(4) each affected client gives informed consent, confirmed in writing.”¹³⁹

Thus, for example, if a lawyer represents Client A in Matter 1, he may bring a lawsuit on behalf of Client B against Client A in Matter 2 provided that Matter 1 and Matter 2 are unrelated, and both clients consent,¹⁴⁰ but a lawyer may not bring a claim on behalf of Client B against Client A in the same litigation even if both clients consent because of the prohibition in 1.7(b)(3).¹⁴¹ If the conflict is unconsentable then the lawyer must withdraw.¹⁴²

In this situation, the lawyer is not asserting a claim by one client against another in the same litigation and the representation is not prohibited by law so the lawyer’s ability to continue to represent the client turns on whether (1) “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation” to the client and (2) the client “gives informed consent, confirmed in writing.”¹⁴³ If the lawyer recognizes and understands that he needs to continue to act in the best interests of the client without regard to the effect on the potential malpractice claim, then it seems that the lawyer could “reasonably believe that he is able to continue to provide competent and diligent representation,” particularly because, as previously noted, the lawyer’s and client’s interests are, in a sense, the same—both want to “defeat the consequences of the underlying error” and win the underlying litigation.¹⁴⁴ Thus, the lawyer should be able to continue the representation provided he obtains “informed consent” in writing.

But what should this informed consent look like? In other words, how does this legal analysis translate into an actual conversation between the lawyer and the client? First, the lawyer must report all of the relevant facts

¹³⁹MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2007).

¹⁴⁰*Id.*; see, e.g., *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992).

¹⁴¹MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(3).

¹⁴²*Id.* at R. 1.16.

¹⁴³*Id.* at R. 1.7(b).

¹⁴⁴Wright, *supra* note 122, at 37 (“With proper disclosures, the continued representation of the client by the attorney who has committed an error should not create a conflict. This is because the interests of the client and attorney are identical in that they both seek to cure the consequences of the error.”). *But see* The Ass’n of the Bar of the City of N.Y., Formal Op. No. 1995-2N.Y. (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.”).

and circumstances of the mistake that he or his firm made as part of his ethical duty to fully inform the client about the representation.¹⁴⁵ This is one of the most difficult things that a lawyer or law firm must do. The lawyer, like any person, takes professional pride in the job that he does and does not want to admit that he made a mistake, and he certainly does not want to admit it to the client. Of course, the lawyer also does not want to make an admission about his malpractice that can be used against him in a subsequent legal claim.

Does the lawyer actually have to use the word “malpractice” during the conversation? The Restatement, which provides: “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,”¹⁴⁶ is not entirely clear on the matter, because the “that” in the second clause could refer to either “the lawyer’s conduct” or the “substantial malpractice claim.” In considering this precise question, the Bar Association for the City of New York properly found that it was not necessary for the word “malpractice” to be used: “While we do not believe the word ‘malpractice’ must necessarily be used in directing the client to seek legal advice, the client must be advised of the need to receive such advice.”¹⁴⁷

Second, the lawyer should recommend that the client obtain independent legal advice on the matter.¹⁴⁸ From an economic standpoint, the lawyer does not want to lose the client’s business, either on this matter, on future matters, or from referrals that might come from this client.¹⁴⁹ But, as noted above, it is clearly the right thing to do under the rules. A new lawyer with fresh eyes can evaluate the situation and advise the client on his potential malpractice claim, as well as the wisdom of continuing with the current representation.

Finally, is a conversation with the client sufficient or should the lawyer convey this information in writing to the client? At least one commentator

¹⁴⁵ MODEL RULES OF PROF’L CONDUCT R. 1.4 (2007).

¹⁴⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000).

¹⁴⁷ The Ass’n of the Bar of the City of N.Y., Formal Op. No. 1995-2N.Y. (1995).

¹⁴⁸ William H. Fortune & Dulaney O’Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 635 (1994) (“[I]f it might reasonably be contended that malpractice has been committed—that is the facts might support a finding of duty, breach causation and damages—the attorneys must fully inform the client and suggest that the client confer with independent counsel.”).

¹⁴⁹ Galanter & Henderson, *supra* note 11.

has said that the information should be in writing.¹⁵⁰ Certainly, putting the information in writing will protect the lawyer in the event that there is any question in the future as to what exactly the lawyer told the client about his malpractice. Moreover, under Rule 1.7(b), in order to continue with the conflicted representation, the client's informed consent must be in writing.¹⁵¹ For that reason, communicating in writing is a good idea under most circumstances. That being said, the lawyer should be very careful about what he says and how he says it since the writing is likely to be a piece of evidence against the lawyer in the event that the client brings a malpractice claim.

As excruciating as this communication with the client might be, meeting with the client and informing him that the lawyer may have made an error that has resulted in litigation may not actually be detrimental to the lawyer. First, the client may be happier to find out sooner rather than later about the lawyer's mistake. If the client is not informed and does not find out about the lawyer's conduct in a timely manner, he may be even angrier once he does find out since he might perceive that the lawyer has been less than completely honest and forthcoming with him. This might make the client even more likely to sue the law firm.¹⁵²

What we are learning from the medical malpractice world supports this view that having a frank discussion with the client may actually engender goodwill between the attorney and client and serve to reduce the number of malpractice claims that are actually brought and litigated.¹⁵³ As *The New York Times* recently reported, the traditional advice of malpractice lawyers and insurers to hospitals and doctors faced with malpractice claims has been

¹⁵⁰Frances P. Solari, *Malpractice and Ethical Considerations*, 19 N.C. CENT. L.J. 165, 175 (1990–1991) (“If an attorney discovers that she has been negligent in representing a client, the best course of action is to immediately inform the client in writing of the error and the client's possible malpractice claim.”).

¹⁵¹MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2002).

¹⁵²Pollock, *supra* note 6, at 21 (“In addition to possible disciplinary proceedings, hiding a mistake from the client can increase both the likelihood of and the repercussions from a malpractice suit once the mistake is discovered, especially with a longstanding client with whom the lawyer has built goodwill. Who would you be more apt to sue—someone who fully discloses to you a potential problem and her potential responsibility, or someone caught hiding the problem from you?”); Kevin Sack, *Doctors Say ‘I’m Sorry’ Before ‘See You in Court’*, N.Y. TIMES, May 18, 2008, available at <http://www.nytimes.com/2008/05/18/us/18apology.html> (“[Medical] Malpractice lawyers say that what often transforms a reasonable patient into an indignant plaintiff is less an error than its concealment, and the victim's concern that it will happen again”).

¹⁵³See Sack, *supra* note 152.

to “deny and defend.”¹⁵⁴ But “a handful of prominent academic medical centers” are trying a new approach: “By promptly disclosing medical errors, and offering earnest apologies and fair compensation, they hope to restore integrity to dealing with patients, make it easier to learn from mistakes and dilute anger that often fuels lawsuits.”¹⁵⁵ So far the hospitals that have tried this approach have seen a decrease in medical malpractice cases and lower legal costs.¹⁵⁶ At the University of Michigan Health System, for example, “existing claims and lawsuits” dropped from 262 in August 2001 to eighty-three in August 2007.¹⁵⁷ Of the thirty-seven cases in which the University of Illinois has acknowledged an error and apologized, only one patient has filed suit.¹⁵⁸

This analysis may not carry over to the field of legal malpractice, however. When the plaintiff in a potential legal malpractice claim is a large corporation that is economically motivated—and, indeed, legally obligated—to maximize profits for its shareholders, an apology may not be sufficient.

Apologies may also prove problematic where the client is an individual. While the corporate client tends to be at least as sophisticated as its big-firm lawyer, some empirical studies conclude that individual clients tend to be less educated and sophisticated than their lawyers.¹⁵⁹ As a result, individual clients may be more easily subject to manipulation than corporate clients and more easily duped into accepting a lawyer’s apology in lieu of a potentially lucrative malpractice suit.

Finally, informing the client of the potential malpractice claim has another benefit for the lawyer—it should prevent any potential claim based on the failure to inform. If the lawyer makes a timely disclosure of the error

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Similarly, the “number of malpractice filings against the University of Illinois had dropped by half since it started its program just over two years ago.” *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005); see also Steven L. Pepper, *Applying the Fundamentals of Lawyers’ Ethics to Insurance Defense Practice*, 4 CONN. INSUR. L. J. 27, 45 (1997) (observing that “less elite lawyers” are powerful vis-à-vis their individual clients and that the clients are therefore likely to need protection); Eli Wald, *Taking Attorney-Client Communications (And Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 752 n.24 (2007–2008).

to the client, then the client cannot bring a legal malpractice claim based on a failure to self-report even if the client does decide to sue for the original malpractice.

C. *The Privilege Problem*

Given what is at stake in self-reporting to a client, a lawyer would certainly like to consult his colleagues and the firm's in-house counsel if the firm employs one. Unfortunately, based on several recent decisions, those communications likely are not protected by the attorney-client privilege.

In *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*,¹⁶⁰ the clients informed their law firm on July 9, 2001, that they were "considering a malpractice action against it" but "continued to retain the firm" until August 13, 2001.¹⁶¹ During that time, several lawyers in the law firm "consulted with another lawyer in the firm concerning ethical and legal issues that had arisen out of the portent of a malpractice action" and generated "various internal documents."¹⁶² When the client did subsequently bring a malpractice action, the law firm sought to claim attorney-client privilege over these documents. The court held that during the relevant period, the firm was "in a conflict of interest relationship with its clients" and therefore rejected the firm's invocation of the attorney-client and attorney work-product privilege.¹⁶³ It reached this conclusion despite the fact that the clients had "consulted with and engaged other outside counsel to represent them" during that same period because that fact did not "remove the conflict so long as [the law firm] continued to represent the [clients.]"¹⁶⁴ The court also reached its conclusion despite its finding that the firm was in an "unenviable position" since the July 9 announcement came two weeks before a scheduled hearing in the case. The court suggested only one way for the firm to get out of this predicament: "To avoid or minimize the predicament in which it found itself, the firm

¹⁶⁰212 F.R.D. 283 (E.D. Pa. 2002).

¹⁶¹*Id.* at 284.

¹⁶²*Id.*

¹⁶³*Id.* at 286.

¹⁶⁴*Id.*

could have promptly sought to withdraw as counsel.”¹⁶⁵ Two other courts have recently reached similar conclusion.¹⁶⁶

These decisions have been properly criticized by the academic community¹⁶⁷ and the bar.¹⁶⁸ Leaving aside criticisms of the legal analysis,¹⁶⁹ *Koen Book* is bad for policy reasons. Principally, these decisions discourage lawyers from seeking out advice in order to comply with their legal and ethical duties. As one commentator has said:

It makes no sense to craft a conflict of interest exception to the attorney-client privilege, or to otherwise abrogate the privilege based on some sort of conflict analysis [because] to do so would have the perverse effect of discouraging law firms from appointing in-house general counsel and ethics counsel who in all likelihood spend far more time dispensing prophylactic advice valuable to their firms and to their firms’ clients alike than they do conducting internal

¹⁶⁵ *Id.*

¹⁶⁶ See *Bank of Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F.Supp.2d 283, 286–88 (S.D. N.Y. 2002); *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 879 (Wash. App. 2005) (holding that “[w]hen a law firm seeks advice from its in-house lawyer concerning potential malpractice in its representation of a client, the law firm’s position can be adverse to or limit the law firm’s representation of its client and create a conflict of interest” and remanding to lower court for determination of “whether there is a conflict between the law firm’s own interests and its fiduciary duty to *VersusLaw*”); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY*, § 5.1–1 (2007-2008) (“If there is a dispute between the client and the law firm, many cases do not allow the law firm to assert an adverse attorney-client privilege against an existing client. In other words, the attorney client privilege does not protect a law firm’s communication with its own in-house [sic] counsel if the communication implicates or creates a conflict between the law firm’s fiduciary duties to itself and its duties to the client seeking to discover the communication. When a law firm seeks advice from its in-house lawyer concerning potential malpractice in its representation of a client, the law firm’s position can be adverse to or limit the law firm’s representation of its client and create a conflict of interest.”).

¹⁶⁷ See, e.g., Elizabeth Chambliss, *The Scope of in-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005); Douglas Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69 (2004).

¹⁶⁸ See Anthony E. Davis, *News Communications, Law Firm General Counsel: Protections Available When Lawyers Make Mistakes*, 11/9/2005 N.Y.L.J. 3.

¹⁶⁹ Chambliss, *supra* note 169, at 1739–48.

investigations after potential problems are alleged to arise.¹⁷⁰

But whether these decisions are rightly or wrongly decided, lawyers and law firms have to deal with them, and there is no easy answer for how they should do that. Law firms certainly should have a regular ethics counsel, whose only role in a case like this is to conduct an investigation for the purpose of providing legal advice to the firm.¹⁷¹ The ethics counsel also should take a number of precautions to try to provide the maximum protection to any documents and communications—for instance, the ethics counsel should not discuss his investigations with “curious partners and associates.”¹⁷² But, at the end of the day, if the law firm wants to ensure that documents and communications relevant to the law firm’s internal investigation are privileged, the law firm’s options are limited. First, as the court suggested in *Koen Book*, the firm may withdraw from the representation of the client, which eliminates the conflict of interest with the client,¹⁷³ but withdrawal is not always possible¹⁷⁴ nor is it necessarily desirable since the firm does not want to lose the business. Second, the firm may try to seek a waiver of any potential conflict of interest from the client,¹⁷⁵ but if the client is not aware of any potential problem, and the law firm is investigating in order to determine whether it has a self-reporting duty, this is a very unattractive option since it may unnecessarily damage the attorney-client relationship. Third, the firm could hire outside counsel to conduct the investigation,¹⁷⁶ since this outside lawyer has no conflict of interest though this comes at a significant financial cost and seems unnecessary if the law firm employs ethics counsel for this very reason.

¹⁷⁰Richmond, *supra* note 167, at 101; Chambliss, *supra* note 165, at 1744 (“A law firm, like any fiduciary, maintains the right to seek legal advice regarding its duties to clients, and there is nothing about the firm’s duty to the client per se that prevents the privilege from attaching.”).

¹⁷¹Richmond, *supra* note 167, at 104–05.

¹⁷²*Id.* at 105.

¹⁷³*Id.* at 106; *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. at 286 (proposing this option).

¹⁷⁴See MODEL RULES OF PROF’L CONDUCT R. 1.16(c) (2002) (noting that in litigation lawyers generally need permission from the tribunal to withdraw).

¹⁷⁵Richmond, *supra* note 167, at 106.

¹⁷⁶*Id.* at 107; Davis, *supra* note 168, at 3 (“One of the notable (and undoubtedly unintended) consequences of the existing case law is that solo practitioners, who have no choice but to go to outside counsel . . . will be more likely to be protected when they do so than firms who seek to use their in-house lawyers to obtain the same type of advice.”).

Finally, with some foresight, the law firm could try to put a prospective waiver in the retainer agreement that the client consents to the confidentiality of communications between lawyers who work on the case and the firm's ethics committee,¹⁷⁷ but clients might balk at such a provision. In short, none of these solutions is particularly desirable,¹⁷⁸ but lawyers who find that they must self-report will need to do the best that they can.

IV. THE CONSEQUENCES OF FAILURE TO SELF-REPORT

As the foregoing discussion demonstrates, when a lawyer fails to comply with his self-reporting duty, he may be subject to discipline by the appropriate bar authorities for violating Rule 1.4 or Rule 1.7.¹⁷⁹ But are there any other consequences for the attorney? On first blush, the answer would appear to be no since the client already has a malpractice action against the lawyer for the underlying misconduct (i.e. the poorly drafted clause in the contract) so, even assuming that a violation of the self-reporting duty gave rise to an independent malpractice claim, the advantages to the client of bringing such a claim are not immediately obvious. As set forth below, however, the potential advantages to the client (and negative consequences for the lawyer) are numerous. In this section, I will first explain why a violation of the self-reporting duty does give rise to an independent malpractice claim and then explain those various negative consequences for the lawyer.

Disenchanted clients may assert two distinct claims against their lawyers—one for professional negligence and a second for breach of

¹⁷⁷Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 748 (June 2001) (arguing that law firms should adopt their own codes of professional responsibility that, among other things, require a lawyer to inform the firm's ethics committee "[i]f a lawyer in [the] firm has reasonable belief that another lawyer has violated any provision" of the firm's ethics code).

¹⁷⁸See Davis, *supra* note 168, at 3 ("In the absence of the right to treat such communications as privileged, lawyers urgently needing assistance may end up prematurely withdrawing from an engagement in order to get advice, or in order not to incur the expense of going to outside counsel, or may fail to get any advice—neither of which solutions can possibly serve the interest of either the lawyer or the client.").

¹⁷⁹See Part I *supra*; Attorney Grievance Comm'n of Md. v. Pennington, 876 A.2d 642 (Md. 2005) (attorney disciplined for failing to advise client that their complaint had been dismissed with prejudice due to attorney error).

fiduciary duty.¹⁸⁰ Plaintiffs, courts and commentators frequently lump these together as “legal malpractice” claims, but, as Professor David McGowan points out, it is best to think of them as two separate claims—a professional negligence claim when the lawyer has breached his duty of *care* to the client and a breach of fiduciary duty claim when the lawyer has violated his duty of *loyalty* to the client.¹⁸¹ In order to establish a claim for professional negligence, a client must generally establish the existence of an attorney-client relationship (duty), failure of the attorney to exercise reasonable skill, knowledge and diligence of a similarly situated lawyer (breach of the duty of care), and that the attorney’s negligence proximately caused damage to the client.¹⁸²

As for the breach of fiduciary duty claim, the law “lacks coherence and is far from settled,”¹⁸³ but the claim is best thought of as a breach of the attorney’s duty of loyalty to the client as when the lawyer “violat[es] the prohibitions against conflicts of interest,”¹⁸⁴ or misuses client confidences. In general, a plaintiff in a breach-of-fiduciary duty claim must establish: “(1) an attorney-client relationship; (2) breach of the attorney’s fiduciary

¹⁸⁰ See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach As Legal Malpractice*, 34 HOFSTRA L. REV. 689 (Spring 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48–49 (2000); *Cecala v. Newman*, 532 F.Supp.2d 1118, 1134-35 (D. Ariz. 2007) (recognizing separate causes of action).

¹⁸¹ David McGowan, “Confusion over Breach of Fiduciary Duty,” Legal Ethics Forum, April 11, 2007 (http://legaethicsforum.typepad.com/blog/2007/04/confusion_over_.html). In his recent article, Professor Wolfram argues persuasively that courts should not recognize breach of fiduciary duty claims as independent causes of action when they simply re-hash professional negligence claims.

¹⁸² See, e.g., *dePape v. Trinity Health Systems, Inc.*, 242 F. Supp.2d 585, 608 (N.D. Iowa 2003) (“In a legal malpractice case, the plaintiff must demonstrate: (1) the existence of an attorney client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney’s breach of duty proximately caused injury to the client, and, (4) the client sustained actual injury, loss, or damage.”); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 616–17 (3d Cir. 1991) (“To establish legal malpractice under Pennsylvania law, plaintiffs must show three elements: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) the attorney’s negligence proximately caused damage to the client.”).

¹⁸³ Wolfram, *supra* note 180, at 706.

¹⁸⁴ *Id.* at 714–15. The Restatement recognizes a breach-of-fiduciary duty claim where the client is damaged by the lawyer’s failure to “comply with obligations concerning the client’s confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49, 16(3).

duty to the client [breach of the duty of loyalty]; (3) causation, both actual and proximate; and (4) damages suffered by the client.”¹⁸⁵

How does a client establish a breach of the duty of care or the duty of loyalty? Although the Model Rules of Professional Conduct state that a “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor . . . create a presumption in such a case that a legal duty has been breached,”¹⁸⁶—presumably, this is a case of the lawyers who draft the model rules protecting themselves and other lawyers—in reality, most jurisdictions “treat as actionable negligence any claim that a lawyer caused harm to the client through a breach of almost all of the provisions of the applicable lawyer code governing lawyer’s conduct.”¹⁸⁷ In other words, client-plaintiffs in most jurisdictions are allowed to present, usually through expert testimony, evidence that the lawyer-defendant breached the applicable lawyer code.¹⁸⁸

Applying these elements to the self-reporting duty, there is obviously a duty arising out of the attorney-client relationship. Moreover, there is a breach of that duty based on the lawyer’s violation of Rule 1.4 or Rule 1.7. The only remaining issues are causation and damages. In many cases, the violation of the self-reporting duty may not give rise to any further damages to the client over and above the damage caused by the underlying malpractice.¹⁸⁹ But that is not the end of the inquiry. Many courts have recognized that when a lawyer breaches a fiduciary duty to a client, the client is entitled to certain remedies—principally fee forfeiture—even in the absence of proof that the violation of the fiduciary duty gave rise to damages: “[C]ourts have not required a client seeking fee forfeiture to show

¹⁸⁵ *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290–93 (Utah Ct. App. 1996); 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 14:2 (2008).

¹⁸⁶ MODEL RULES OF PROF’L CONDUCT, scope, ¶ 20 (2002).

¹⁸⁷ Wolfram, *supra* note 180, at 700; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. f; Richmond, *supra* note 21, at 235 (“In suits against lawyers, plaintiffs and courts may rely on ethics rules to establish the standard of care, rendering irrelevant any perceived distinction between law firm partners’ supervisory duties as ‘ethical’ rather than ‘legal.’”).

¹⁸⁸ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. G; *but see* *Hizey v. Carpenter*, 830 P.2d 646, 654 (Wash. 1992) (holding that an expert could rely on lawyer codes in giving testimony but expert could not mention reliance on lawyer code to jury).

¹⁸⁹ Generally speaking, “there is no civil cause of action for a lawyer’s failure to confess legal malpractice, which consists simply of nondisclosure of prior negligent conduct, unless there was an independent tort or risk of additional injury. Typically, the damage is caused by the original negligence and not contributed to or enhanced by the nondisclosure.” 3 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 24:5 (2008 ed.).

that the lawyer's wrongful conduct caused the client harm"¹⁹⁰ The theory behind this is that the client is paying the lawyer to be his loyal agent and fiduciary; if the lawyer breaches a fiduciary duty of loyalty to the client i.e. fails in his role as fiduciary, he does not deserve to be compensated even if the client has otherwise benefited from the lawyer's work.¹⁹¹ "Fee forfeiture, in the absence of harm to the client, obviously provides a remedy with a substantive element quite different from what would otherwise be available by means of an action for either negligence or fiduciary breach."¹⁹²

In addition to disgorgement of fees even without causation, a breach of the self-reporting duty can have other bad consequences for the lawyer. First, a failure to self-report may open up the lawyer to a claim for punitive damages because of the lawyer's dishonesty in hiding (or at least failing to disclose) his malpractice.¹⁹³ Generally, a legal malpractice plaintiff may not obtain punitive damages without demonstrating that the lawyer acted with "an improper intent, typically fraud, malice or oppression,"¹⁹⁴ but a claim that the lawyer failed to disclose his malpractice could make punitive damages more likely to meet this standard. The possibility of punitive

¹⁹⁰Wolfram, *supra* note 180, at 702.

¹⁹¹Duncan, *supra* note 52, at 1156–57.

¹⁹²Wolfram, *supra* note 180, at 702; *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1285 (Pa. 1992) ("Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests."); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (holding that clients could recover all or part of lawyer's fees regardless of whether clients suffered actual damages as a result of the breach of fiduciary duty); Pollock, *supra* note 6, at 23 ("Another very real danger for a lawyer who mishandles her obligations to the client following a mistake is fee forfeiture or disgorgement."); Duncan, *supra* note 52, at 1156 (noting that plaintiff in fiduciary duty action may "recover any profit realized by the fiduciary through acts inconsistent with the fiduciary's obligation of fidelity. This policy provides the plaintiff with the potential to recover part or all of any fee that the fiduciary received for his fiduciary services").

¹⁹³Charles E. Lundberg, *Self-Reporting Malpractice or Ethics Problems*, Bench & B. Minn., Sept. 2003, at 24–25; Pollock, *supra* note 46, at 22 ("[A]n ordinary negligence based malpractice action is generally not going to subject an attorney to punitive damages. If a plaintiff, however, can pile on allegations that the lawyer breached his fiduciary duties and in particular concealed his wrongdoing, punitive damages become more likely.") (citing Ronald E. Mallen & Jeffrey M. Smith, 3 *Legal Malpractice* § 20.16 at 53 (2006 ed.); *Metcalf v. Waters*, 970 S.W.2d 448 (Tenn. 1998).

¹⁹⁴MALLEN & SMITH, *supra* note 189, § 21:16. A few jurisdictions prohibit the recovery of punitive damages in legal malpractice cases. *Id.*

damages is particularly significant since many malpractice insurers do not cover punitive damages.¹⁹⁵ As a policy matter, the potential of paying punitive damages out of pocket should have the salutary effect of encouraging lawyers to self-report.

Second, a violation of the self-reporting duty may give rise to jurisdiction in a new place for the client's malpractice claim. For example, if the underlying malpractice involved the representation by the British partner of a U.S. firm, but the ensuing litigation over the "deal gone bad" is filed in the United States, then the subsequent malpractice suit for both the underlying malpractice and for the failure to self-report may also be filed in the United States. For many reasons—principally the high awards handed out by American juries—lawyers would prefer not to be sued in American courts whenever possible.

Finally, and perhaps most significantly, the failure of the lawyer to self-report is likely to make the lawyer and law firm look bad in front of the ultimate decisionmaker in the malpractice trial and make it more likely that the law firm will lose the underlying malpractice case.¹⁹⁶ As strong as the law firm's defense of the underlying malpractice might be, a jury might be influenced by the lawyer's lack of candor in failing to self-report.

CONCLUSION

This Article has taken a comprehensive look at an issue that has not received significant academic attention and one which lawyers need to be sensitive to: the lawyer's duty to report his own malpractice to his client. Greater recognition of this duty is consistent with the moral and philosophical underpinnings of the doctrine of informed consent.

This self-reporting duty is well rooted in Rules 1.4 (Communication) and 1.7 (Conflicts of Interest) of the Model Rules of Professional Conduct, as well as the fiduciary law governing the attorney-client relationship upon which the rules of professional conduct are based. The lawyer's duty to communicate—to keep the client reasonably informed about the status of

¹⁹⁵ Pollock, *supra* note 6, at 22.

¹⁹⁶ *Id.* ("In the end, all these possible ramifications may be overshadowed by the simple effect that the lawyer's actions will have on a jury."); *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 927–28 (S.D. N.Y. 1997) ("Viewed through the lens of a potential conflict of interest, defendants' otherwise defensible tactical decisions take on a more troubling gloss, and suggest at least the possibility that defendants' divided loyalties substantially contributed to [their clients'] defeat . . .").

the matter” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”¹⁹⁷—surely incorporates the duty to report mistakes, at least significant ones. Moreover, the duty to avoid personal interest conflicts also compels self-reporting. Once the lawyer’s conduct has given rise to a substantial malpractice claim by his client, the lawyer might want to settle the litigation quickly in order to try and hide his mistake or minimize the damages available to the client in a subsequent malpractice case; alternatively, the lawyer might want to litigate the case to the end to vindicate his (or his law firm’s) original advice while the client’s interest would be best served by reaching the quickest and least expensive resolution of the litigation.

But not all mistakes require reporting. I have argued that only material mistakes need to be reported i.e. when the error is one that a reasonable client would find significant in making decisions about (1) the lawyer-client relationship and (2) the continued representation by the lawyer or law firm. Thus, the lawyer must ask how bad the mistake was and how much harm did it cause.

Finally, there are several significant negative consequences for the lawyer who fails to self-report. Most significantly, the failure to self-report could itself be the subject of an independent breach of fiduciary duty claim, which, if successful, could lead to the lawyer having to forfeit his fee even in the absence of any injury directly caused by the failure to self-report. In addition, the failure to self-report could hurt the lawyer’s defense of the underlying malpractice claim in two significant respects. First, the failure to self-report could make the lawyer look bad in the jury’s eyes and make it more likely that the lawyer will lose the malpractice case. Second, the failure to self-report could establish the malice necessary for an award of punitive damages against the lawyer. These negative consequences should give lawyers an incentive to think more about their potential self-reporting obligations and, in the appropriate circumstances, to report their errors to their clients.

¹⁹⁷MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2002).