# MEMORANDUM

TO: MSBA MRPC Committee

FROM: William Wernz

DATE: December 9, 2019

RE: Final Amended LPRB Op. No. 21 (Disclosing Material Error)

Current Lawyers Board Op. 21 (2009) addresses a lawyer's duty to consult with a client when the lawyer knows he or she has committed malpractice. In 2018, the ABA issued Formal Opinion 481, addressing a lawyer's duties when the lawyer believes he or she has committed a "material error."

At its April 26, 2019 meeting, the Lawyers Board first considered whether to amend Board Op. No. 21, to "conform" to Op. 481. The April Board minutes report that the Board Chair inquired about the mental state of the lawyer that amended Op. 21 should identify. The minutes also reported that, "Ms. Humiston stated that she believes that language addressing this issue could be included from ABA Formal Opinion 481 into Lawyers Board Opinion No. 21 to give guidance." Including this language would be consistent with LPRB's intent to "conform" Op. 21 to Op. 481.

In July 2019, the Board posted a draft proposed amended LPRB Op. No. 21. However, the draft did not in fact include Op. 481's mental state requirement or have any mental state requirement. The Board sought comments from stakeholders. In September 2019, the MSBA MRPC Committee submitted and discussed comments with representatives of the Board and the Office of Lawyers Professional Responsibility. The comments mainly concerned the Board's deletion of the mental state requirements of ABA Op. 481 ("believes") and current Op. 21 ("knows").

On November 19, 2019, the LPRB Opinions Committee notified the MSBA MRPC Committee Chair that it recommended further changes to the proposed opinion. The main change was to adopt a mental state test of "knows or should know" the lawyer has committed a material error. The LPRB now seeks the MSBA Committee's comments on the Opinions Committee draft. The LPRB expects to vote on a proposed amended Opinion 21 at its January 31, 2020, meeting. The Chair asked me to draft comments on the proposal for the MSBA MRPC Committee to consider at its December 17 meeting.

I have not commented on the basic proposal to expand the universe of attorney conduct that triggers a duty to consult, from "malpractice" to "material error." The Board has decided on that expansion and several bar opinions support this amendment. Assuming the Board will amend Op. 21 to effect that expansion, this memo proposes comments on the following subjects.

1. Why the mental state test, "knows or should know" the lawyer has committed a material error is unprecedented, unwise, and unwieldy.

2. Why the definition of "material error" as, "would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice" is unprecedented (except in ABA Op. 481), unwise, and unwieldy.

3. How, if the Board adopts the above test and definition, there will be problems enforcing Rules of Professional Conduct 1.4 and 1.7, as interpreted by amended Op. 21.

4. How, if the Board adopts the "knows or should know" test, Op. 21 will require several drafting corrections.

## I. Lawyer's Mental State: "Knows," or "Believes," or "Knows or Should Know"

**A. Background.** Mental state requirements are often crucial for the MRPC. For example, the Court recently reversed an admonition because OLPR failed to prove the knowledge requirement for violation of Rule 3.4(c) ("*knowingly* disobey an obligation under the rules of a tribunal"). *In* re *Panel File No. 42735*, 924 N.W.2d 266 (Minn. 2019). Similarly, OLPR and respondents have frequently argued whether the Rule 8.4(c) prohibition on "misrepresentation" includes any scienter element.

Current Op. 21 finds certain duties when a lawyer "*knows* that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim." "Knows" means "actual knowledge." Rule 1.0(g). ABA Op. 481 opines that duties arise when a lawyer "*believes"* he or she committed "a material error." "Belief" means "actually supposed the fact in question to be true." Rule 1.0(a).

**B. "Knows or Should Know:" A Novel Test for the "Plain Meaning" of the Rules.** The current draft of proposed Op. 21 states that, "A lawyer who *knows or should know* that he or she has committed a material error involving a current client has one or more duties. . .." The current draft states that the Board intends that Op. 21 "conform" to ABA Op. 481. Proposed Op. 21 does not explain how changing the mental state requirement from "believes" to "knows or should know" serves the Board's intent to conform.

ABA Op. 481 cites several state bar opinions that have mental state requirements for reporting malpractice or material error. Calif. Eth. Op. 2009-178 applies, "Where the lawyer *believes* that he or she has committed legal malpractice." N.C. State Bar Formal Op. 4 (2015) relates to "the actions that the lawyer takes following the *realization* that she has committed an error. . .." N.J. Sup. Ct. Adv. Comm. on Prof'l Ethics Op. 684 requires disclosure, "when the attorney *ascertains* malpractice may have occurred, . . ." Texas Op. 593 finds that duties arise upon the lawyer "*recognizing"* an error. Two state bar opinions cited in Op. 481 do not have an express mental state requirement. Colo. Bar Ass'n Ethics Comm. Formal Op. 113; NYSBA Comm. On Prof'l Ethics Eth. Op. 734.

"Knows or should know" does not appear in Op. 481, nor in any of the state bar opinions cited in Op. 481, nor in current Op. 21.

The Minnesota Supreme Court has held, "Pursuant to Rule 4(c), RLPR, Board opinions that interpret preexisting rules without either effectively creating new rules of professional conduct or exceeding the scope or plain meaning of the rules are entitled to careful consideration." *In re Panel File 99-42*, 621 N.W.2d 240, 241 (Minn. 2001).

Can it be said that the "plain meaning" of the MRPC which proposed Op. 21 purports to interpret includes a "knows or should know" test, when every other ethics opinion that interprets the same rules uses some other test? I do not think so. Is the "knows or should know" test so clearly the best alternative that Minnesota should become the first state to adopt it? No explanation of the merits of this test has been offered.

**C. Conflicts Analysis and Other Problems With the "Should Know" Test**

Discussion of this issue can be prefaced by noting and correcting a minor drafting problem with the "should know" test. "Should know" is undefined. However, adding "reasonably" corrects the problem. "Reasonably should know" denotes that, "a lawyer of reasonable prudence and competence would ascertain the matter in question." Rule 1.0(k).

There are two problems with the "[reasonably] should know" test that are not minor and are not correctible.

The first problem is that "knows or should know" would appear to cover virtually all situations in which a material error has been made. When should a lawyer reasonably know of the lawyer's material error? Would a prudent, competent lawyer likely recognize substantially all material errors? If so, the "knows or [reasonably] should know" test would provide no real mental state test. All or substantially all "material error" occurrences would trigger client consultation duties, because all such errors reasonably should be known.

The second problem is that the "[reasonably] should know" test does not coordinate with the Rule 1.7(a)(2) (materially limited representation conflicts) application of proposed Op. 21. Current Op. 21, proposed Op. 21, and ABA 481 all discuss a conflict of interest that may arise under Rule 1.7(a)(2). The conflict is between the lawyer's duties of disclosure and consultation to a client and the lawyer's concern about consequences to the lawyer from the lawyer's material error. In a common paradigm, a lawyer who knows of an error may be tempted to keep the error undisclosed, and recommend a settlement that would otherwise be insufficient, because settlement will make the client's discovery of the error unlikely. This conflict arises, however, only where the lawyer is aware of the error. Under the "should know" standard of proposed Op. 21, the lawyer is not aware of the error.

Rule 1.7(a)(2) conflicts almost always arise from a pull toward the interests of the lawyer, or another client of the lawyer, and the push to act solely in the client's interests. The lawyer who is unaware of the pulling force does not have a conflict.

Analysis of the severity of Rule 1.7(a)(2) conflicts also requires awareness of the facts that produce the conflict. As proposed Op. 21 notes, Rule 1.7 provides, "the lawyer *must reasonably believe* he or she may continue to provide competent and diligent representation . . .." Such a required belief fits the mental states of current Op. 21 ("knows") and of ABA 481 ("believes"), but does not fit the "should know" criterion of proposed Op. 21. The lawyer who merely "should know" of an error will believe that "competent and diligent representation" is unimpeded, and will not analyze any conflict.

## II. Another Novel Test: "Would Reasonably Cause a Client to Consider Terminating the Lawyer"

Most of the state bar opinions cited by ABA Op. 481, including current Minnesota Op. 21, as well as the Restatement, require a lawyer to consult with a client on the lawyer's recognition of "malpractice." Other opinions cited by Op. 481 require consultation, more broadly, when the lawyer has committed a "material error." These opinions define "error" or "material error" to include "prejudice" or "harm." The "material error" test of Op. 481 is novel insofar as it finds duties where there is no harm or prejudice.

ABA Op. 481 and proposed Op. 21 share a definition: "An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice." However, the "consider terminating the lawyer" test is not rooted in any of the opinions cited by Op. 481.

Op. 481 extensively cites Colo. Bar Op. 113 (2005) and North Carolina Op. 2015-4. The Colorado opinion identifies an error that gives rise to consultation duties as one where,

"a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim, . . .." The North Carolina opinion expressly borrows from the Colorado opinion. Op. 481 borrows the "disinterested lawyer" perspective, but adds a fire-the-lawyer alternative to the test of likely prejudice to the client's right or claim.

Is there any pedigree for the test "reasonably cause a client to consider terminating the lawyer?" Op. 481 does not give one. Op. 481 explains its expansion beyond precedent by reference to Rule 1.4 (reasonable communication). Op. 481 takes the position that Rule 1.4 requires communication of anything that "may impair a client's representation," or "would cause a reasonable client to lose confidence in the lawyer's ability," regardless of harm or prejudice.

There are compendious sources for reviewing interpretations by various authorities of Rule 1.4, such as the *ABA Annotated Model Rules of Professional Conduct,* the *Lawyers Manual on Professional Conduct, The Law of Lawyering*, and the Restatement of the Law Governing Lawyers. I have not reviewed these sources, but Op. 481 does not cite any precedent for its interpretation of Rule 1.4.

Again, the question arises, "Can it be said that proposed Op. 21 expresses only the "plain meaning" of the rules when it would be the first state bar opinion to take a position?"

One other touchstone for interpreting Rule 1.4 is the general standard that, "The Rules of Professional Conduct are rules of reason." "Reasonable" is that which "denotes the conduct of a reasonably prudent and competent lawyer." Rule 1.0(i). Do prudent and competent lawyers consult with clients about their harmless errors if they think disclosure would cause the client to lose confidence? Colorado Op. 113 states, "[A]n overbroad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship." *Id.* at 2. I would add that, in my experience, I have not witnessed good lawyers disclosing harmless errors to clients.

## III. Enforcement Problems

As noted above, the Court has held that Board opinions are "entitled to careful consideration," but only insofar as they, "interpret preexisting rules without either effectively creating new rules of professional conduct or exceeding the scope or plain meaning of the rules . . .." *In re Panel File 99-42*, 621 N.W.2d 240, 241 (Minn. 2001). When the Board adopts standards like "knows or should know," the Board can interpret Rule 1.4 and 1.7, but it cannot by its own authority effectively create a new rule. Board opinions can be persuasive authority, as convincing restatements of the rules' plain meaning.

A hypothetical will illustrate enforcement problems for amended Op. 21. Suppose that OLPR issues an admonition to Respondent Roe. The admonition alleges, "In representing Cline, Roe committed a material error, by the following conduct _____. Roe did not communicate regarding the material error to Cline. Roe did not actually know or believe she had committed a material error. Roe's error did not cause harm or prejudice. However, Roe should have known that her conduct would have caused a reasonable client to consider terminating Roe's representation. Roe's conduct violated Rules 1.4 and 1.7(a)(2), as interpreted by amended Opinion 21." Suppose the admonition is appealed.

As to the alleged Rule 1.7(a)(2) violation, in what way was Roe's representation "materially limited?" How does an unknown error limit the representation?

As to the alleged Rule 1.4 violation, is there discipline precedent for not communicating what the lawyer did not know but should have known? The Lawyers Board Panel Manual cites "consistency" as a goal six times on its first page alone.

How will OLPR prove by clear and convincing evidence that a harmless, unknown error was one that a lawyer was nonetheless required to disclose? Opinion 21 itself cannot create *requirements.* If Opinion 21 is intended to persuade adjudicators of the clarity of its interpretation of Rules, what will a Board Panel or the Court make of the facts that (a) the fire-the-lawyer standard is not found in any of the relevant state bar opinions and (b) the should-have-known standard is not found either in other bar opinions or in the ABA opinion, to which Op. 21 claims, misleadingly, to conform?

OLPR will have to provide expert testimony that there was an error, that the error was material, and that knowledge of the error would have caused a reasonable client to consider firing the lawyer. Are the burdens and risks of litigating the admonition appeal commensurate with protecting the public from non-disclosure of harmless, unknown errors?

## IV. Board Jurisprudence, State Bar Opinions, the Restatement, and "Plain Meaning"

In 2016, the Board adopted Op. No. 24, dealing with confidentiality and client critiques, especially on social media. OLPR published an article explaining Op. 24. Patrick R. Burns, *Client Confidentiality and Criticisms,* Bench & B. of Minn., Dec. 2016. The article cited the Court's "plain meaning" limit on Board opinions.

The Burns article cited and summarized at length six bar opinions and the pertinent section of the Restatement. An implied principle of the article was that the Board believes its opinions satisfy the "plain meaning" test when they join the consensus of other bar opinions and the Restatement.

In 2019, OLPR again published an article, offering explanation why the Board seeks to "conform" to Op. 481. Susan Humiston, *Disclosing Errors,* Bench & Bar of Minn., July 2019. The article did not mention any state bar opinion or the Restatement. Moreover, the article did not disclose that (1) Op. 21 rejects the "believes" test of Op. 481; or (2) no state bar opinion uses the could-would-consider-firing-the-lawyer test. The "knows or should know" test was not considered by the Board until after the article was published. In short, the article does not disclose, let alone explain, why Minnesota should be the first state to take the positions of proposed Op. 21. The article also does not explain how being the first state satisfies the Court's requirement that LPRB opinions state only the "plain meaning" of rules.

Comparing the 2016 and 2019 OLPR articles leads to a fundamental question. What is the Board's jurisprudence in determining "plain meaning" and in issuing opinions? In 2015-16, OLPR and the Board anchored Op. 24 in what it saw as a consensus among state and local bar opinions. In 2019, OLPR and the Board depart, without explanation or even recognition, from all state bar opinions.

## V. Drafting Issues

### A. "Conform Opinion 21 With ABA Formal Opinion 481"

The Comment to proposed Am'd Op. 21 states, "The Board is amending Opinion No. 21 to apprise the Bar of the Board's position on the matter and *to conform Opinion 21 with ABA Formal Opinion 481* (April 7, 2018)." (Emphasis added.)

The statement is misleading. By substituting "knows or should know" for "believes," proposed Op. 21 does not "conform" to F.O. 481. The MRPC provide different definitions for "believes" and "reasonably should know." Rule 1.0(a), (k).

As noted above, these different mental states ramify throughout the opinions. Under proposed Op. 21, a lawyer would have duties regarding disclosure of conflicts, determining suitability of waivers, etc., all without any awareness of the conflicts – merely because the lawyer "should know" of the conflict.

### B. "Reasonably Should Know" and "Should Know"

If the Board does not conform Op. 21 to Op. 481 by substituting "believes" for "knows or should know," at least the Board should add "reasonably" to "should know." In opining regarding the MRPC, using defined terms is preferable to using terms that only approximate defined terms.

### C. "Determines" and "Should Know"

The Comment to proposed Op. 21 begins, "The issue of when and what to say to a client when a lawyer *determines* a material error has been committed is difficult and may create inherent conflicts." To "determine" is to "decide." To "decide," one must first "know." Use of "determines" is consistent with the mental state requirements of current Op. 21 ("knows") and of F.O. 481 ("believes") but it is inconsistent with proposed Op. 21 ("knows or should know'). If a lawyer should know of an error, but does not in fact know, the lawyer cannot *determine* "a material error has been committed."

## VI. Conclusion and Recommendations

It appears that the Lawyers Board has not been informed of the fact that it would be the first state or local bar in the United States to issue an opinion that requires lawyers, on a knows or should know basis, to disclose their own harmless errors, defined by a fire-the-lawyer standard, The Board does know actually know that the "knows or should know" standard contrasts with the "believes" standard in ABA Op. 481, but the Opinion Committee proposes to continue to state the purpose of amended Op. 21 is to "conform" to Op. 481. An article purporting to explain amended Op. 21 offers no explanation of these and other problems.

If the Board sees a need to expand the basis for disclosure beyond malpractice, that can be done by more modest and well-founded means. Colorado Op. 113 requires disclosure of errors that result in "prejudice to the client's right or claim." Op. 113 offers numerous examples, e.g. loss of right to a jury trial through a failure to make a timely request, even though the malpractice elements of causation and damages cannot readily be proved. North Carolina Op. 2015-4 expressly followed Op. 113. From an enforcement perspective, harm or prejudice is much more readily proved than whether a reasonable client would consider firing a lawyer.

I recommend that the MSBA MRPC Committee recommend to the Lawyers Board that it:

1. Consider adopting the position of ABA Op. 481 that a lawyer who "believes" she has committed a material error has certain duties.

2. Consider adopting the position of Colorado Op. 113 and other bar opinions, that lawyers are required to disclose errors that result in harm or prejudice to the client's right or claim.

3. If the Board adopts the most recently proposed amended Op. 21, I recommend that it:

    a. Correct the drafting problems identified above.

b. Explain why Minnesota is departing from other states' bar opinions and ABA Op. 481 in material respects, and delete the claim to "conform" to Op. 481.

c. Explain how Op. 21 and its novel positions express the "plain meaning" of the Rules, including how a lawyer who does not know she has committed a material error has a conflict under Rule 1.7(a)(2).