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## Difficult Conversations: Telling Clients About Mistakes

By Mark J. Fucile  
Fucile & Reising LLP

It's every lawyer's nightmare: a serious mistake occurs in handling a case or other work for a client. You're not sure whether it can be repaired or not. The client isn't yet aware of the mistake or its potential impact. What and when do you need to tell your client? Can you proceed at all, and, if so, do you need a written conflict waiver? Finally, who can or should you turn to for advice in evaluating the situation? In this column, we'll look at all three aspects of these difficult conversations.<sup>1</sup>

### *Talking with the Client*

A central tenet of our duties as lawyers is communicating with our clients.

This duty is reflected in the ethics rules in RPC 1.4:

- “(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- “(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

The Supreme Court also cast the duty of communication in fiduciary terms when telling the client about mistakes or other “bad things” that have happened

with a representation. In *In re Obert*, 336 Or 640, 89 P3d 1173 (2004), the lawyer represented a criminal defendant in an appeal. The pertinent appellate statute equated the filing date of the notice of appeal with the date of mailing as long as the notice was sent by registered or certified mail. The lawyer mailed the notice on time, but used regular mail and the notice arrived at the Court of Appeals beyond the appeal period. The Court of Appeals dismissed the appeal on its own motion. The lawyer researched the issue as soon as the appeal was dismissed, but concluded there was no avenue of relief. At that point, the lawyer was so chagrined with his mistake that he could not bring himself to tell his client about the dismissal for nearly five months. The Supreme Court sympathized with the lawyer's feelings but still found the failure to keep the client informed constituted a misrepresentation by omission and held that the lawyer had breached his fiduciary duty to his client:

“A lawyer-client relationship is a fiduciary relationship. . . . It follows, we think, that a lawyer effectively jettisons his or her fiduciary responsibility to safeguard a client's confidence and trust when the lawyer knowingly withholds from a client the all-critical fact that the court has spoken and the client's case is over.” 336 Or at 649 (citations omitted).

The Supreme Court's casting this duty in fiduciary terms is significant because it raises the specter of additional civil liability for breach of fiduciary duty beyond both any initial malpractice and regulatory discipline. The Supreme

Court in *Obert* did not draw a bright line on when a client must be informed of a mistake or other “bad things” in the client’s case. It also suggested that a lawyer should be accorded some time to evaluate the situation and any potential options to rectify the problem. Although it left the time line to the facts of an individual case, the Supreme Court also clearly implied that any delay had to be reasonable under the circumstances.

*Obert* is an extreme example. Nonetheless, it effectively makes the point that bad news seldom improves with age. Under both RPC 1.4 and the fiduciary principles articulated in *Obert*, lawyers have a duty to keep clients informed about their work—including bad news. And, if the bad news includes a possible error by the lawyer, that also needs to be communicated to the client. That is especially important when time remains to potentially correct the error so that the client can make an informed decision about whether to continue with the lawyer or not.

### ***Conflicts and Conflict Waivers***

Does any error, however small, mean that you need a conflict waiver to continue? And, can you even stay on the case in the face of an error?

The Supreme Court in *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004), answered “no” to the first question and outlined the considerations that go into the case-specific answer to the second.

The lawyer in *Knappenberger* was handling an appeal in a marital dissolution case. The opposition filed an answering brief suggesting a procedural defect in service that, if successful, would lead to the dismissal of the appeal. Unlike *Obert*, the lawyer in *Knappenberger* promptly provided a copy of the brief to his client (albeit without specifically calling out the service issue) and continued to work on the appeal. The appeal was eventually dismissed and the question became whether the lawyer should have obtained a conflict waiver immediately upon the service issue arising.

On the first question, the Supreme Court found that not all errors equate with potential malpractice claims and therefore trigger a conflict:

“Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer’s own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if any error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of the representation at risk.” 337 Or at 28.

On the second question, the Supreme Court again did not offer a bright line rule on when a lawyer must withdraw in light of an error or when the lawyer

needs to obtain a conflict waiver to stay. Rather, as the passage just quoted suggests, it cast the analysis in case-specific terms and focused on whether the lawyer's judgment on behalf of the client will be affected by the potential malpractice liability. In other words, is there a risk that the lawyer will skew the balance of the case to minimize malpractice exposure rather than continuing to look solely to the client's best interest? Although *Knappenberger* was decided under former DR 5-101(A)(1), new RPC 1.7(a)(2) frames the question in essentially the same way: Is there "a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer[?]" If the error and its potential consequences rises to that level, then under RPC 1.7(a)(2) and *Knappenberger* the lawyer would at minimum have a duty to seek a conflict waiver before proceeding. Under RPC 1.7(b)(1), however, a lawyer can only proceed with a waiver if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client[.]" Read in tandem, RPC 1.7 and *Knappenberger* suggest that if the error and the potential consequences are severe enough that they might reasonably affect the representation, the lawyer should obtain a waiver and if the lawyer reasonably believes that the representation would be materially compromised regardless, the lawyer should withdraw in favor of new counsel.

Five related points bear stressing in what can often be a "gray area."

*First*, a “bad result” does not equate with either lawyer error or legal malpractice. After all, litigation in many circumstances is a “zero sum game” and someone is going to lose. Simply because a client lost (however defined under the circumstances) does not mean that the representation was in any way inadequate.

*Second*, in many situations, the lawyer who may have committed an arguable error is exactly the person who knows the case well enough to remain on board to correct the error. For example, a lawyer who has handled lengthy and complex litigation may be ideally suited to continue with the litigation and whose interest in correcting the error will be aligned precisely with the client’s interest in having the “bad thing” rectified.

*Third*, if in doubt, no one has ever been disciplined for a conflict waiver that later proved to be unnecessary. If you’re in doubt and plan to continue, a waiver will document your disclosure to the client and the client’s explicit permission for you to continue.

*Fourth*, if you conclude that a waiver is necessary, get it in writing. The Supreme Court in *In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001), and the Bar in Formal Ethics Opinion 2005-61, held that the waiver must be in writing to be effective.

*Fifth*, if you decide that you need to withdraw, RPC 1.16(d) requires that you do so in a way that protects the client’s interests “to the extent reasonably

practicable,” including “giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.” RPC 1.16(c), in turn, requires permission of the court if you are in a litigation context.

### ***Getting Advice***

As *Obert* illustrates, the lawyer who may have made a mistake is often the wrong person to evaluate the potential error, the possible consequences and avenues to rectify the error, whether the lawyer can continue and, if so, what should go into a conflict waiver.<sup>2</sup>

If your firm has a designated internal ethics or risk management lawyer or committee, that is a very good place to start. In doing so, your conversations may be subject to later discovery if the client affected is still a current client of your firm.<sup>3</sup> That risk, however, is outweighed by the need to get good counsel in this kind of situation.

RPC 1.6(b)(3) allows a lawyer to reveal otherwise confidential information to get advice about complying with the lawyer’s professional obligations. Therefore, consultation with outside counsel is also available.

Section VII of the Oregon Professional Liability Fund Plan generally requires prompt notification of potential claims. Many excess plans require the same. Notifying the PLF is not simply a matter of ensuring coverage. The PLF

can offer assistance in evaluating potential claims, possible specialized “repair” counsel to handle efforts to correct errors and conflict waiver forms (the latter are available on the PLF’s web site at [www.osbplf.org](http://www.osbplf.org)).

### ***Summing Up***

Dealing with potential mistakes is never an easy task, whether the conversation is with your client, with counsel or with your carrier. As difficult as those conversations may be, however, they are conversations that need to take place.

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB’s Ethical Oregon Lawyer and the WSBA’s Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar



Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

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<sup>1</sup> Many of the same considerations are applicable to situations where sanctions are pending jointly against clients and their lawyers or where a bar complaint has been filed against a lawyer in an ongoing matter. See generally *In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004).

<sup>2</sup> A separate issue is the disclosure and consent necessary for any settlement with a client in an ongoing matter. RPC 1.8(h)(2) and OSB Formal Ethics Opinion 2005-61 govern those requirements.

<sup>3</sup> See Mark J. Fucile, "Inside Counsel: The Intersection of Internal Law Firm Privilege and Duties to Clients," 66 Oregon State Bar Bulletin 39 (Aug./Sept. 2006), for a discussion of internal law firm privilege.