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Tough Talk:
Telling Clients about Mistakes

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It's every lawyer's nightmare: a serious mistake occurs in handling a case or other work for a client. Although many questions flow from this uncomfortable scenario, two of the most common are: (1) what and when do you need to tell the client? and (2) can you proceed at all, and, if so, do you need a written conflict waiver? In this column, we'll look at both aspects of these difficult conversations.

Before we do, two preliminary comments are in order.

First, we'll focus on "material" errors: those that are reasonably likely to affect the outcome of the matter concerned or the client's confidence in us. For example, a typo discovered in a brief after filing usually will not rise to that standard. By contrast, allowing the statute of limitation to run on the primary claim in a case will likely trigger the materiality standard. By focusing on material errors, it is important to stress that the dividing line between "material" and "non-material" errors can be difficult to determine.[1] The ABA put it this way in Formal Opinion 481 (2018):

> "Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a

nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."[2]

Second, we'll focus on errors in ongoing matters for current clients. ABA Formal Opinion 481 found that that although "[g]ood business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client[,]" the ABA Model Rules do not impose an absolute requirement if the error is discovered after an attorney-client relationship has concluded.[3]

Talking with the Client

RPC 1.4 defines our regulatory duty of communication, and, in doing so, also reflects our underlying fiduciary duty[4]:

"(a) A lawyer shall:

"(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules;

"(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

"(3) keep the client reasonably informed about the status of the matter;

"(4) promptly comply with reasonable requests for information; and

> "(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> "(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Because each situation turns on its own facts, neither the rule nor ABA Formal Opinion 481 specify precisely what a lawyer must tell a client if an error happens. At the same time, both suggest that the lawyer or law firm involved need to tell their client what occurred and its potential impact on the client in language that the client can understand.[5] Ordinarily, this includes the fact that the error created a possible claim against the lawyer—without necessarily conceding the claim.[6]

ABA Formal Opinion 481 also speaks to when a client should be informed:

> "A lawyer must notify a current client of a material error promptly under the circumstances. Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error. Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take

> into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter."[7]

The risk of either an incomplete or an unreasonably delayed explanation is not simply regulatory discipline. In *Shoemake ex rel Guardian v. Ferrer*, 168 Wn.2d 193, 196, 225 P.3d 990 (2010), for example, a lawyer who negligently allowed a case to be dismissed and then waited several years before informing his clients was sued for—and admitted—both legal malpractice and breach of fiduciary duty.[8]

Shoemake is an extreme example. Nonetheless, it effectively makes the point that bad news rarely improves with age. Under RPC 1.4 and the fiduciary duty of communication, lawyers must keep clients informed about their work—including bad news. If the bad news includes a material error by the lawyer, that also needs to be communicated to the client in terms the client can understand. This 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.[9]

Conflicts and Conflict Waivers

Material errors trigger conflicts between the law firm and the client. Under RPC 1.7(a)(2), a conflict arises, in relevant part, when "there is a significant risk

that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Comment 10 to RPC 1.7, for example, notes that a conflict exists "if the probity of a lawyer own conduct . . . is in serious question[.]"[10] With a potential legal malpractice claim, the conflict is typically between the firm's interest in minimizing the error—and the firm's resulting financial exposure—and the client's interest in being made whole if the error results in damages.

Conflicts under RPC 1.7(a)(2) are generally waivable under RPC 1.7(b)—but an effective waiver is predicated on the client's informed consent. The latter, in turn, is a defined term under RPC 1.0A(e):

> "'Informed consent' denotes 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."

RPC 1.7(b)(4) requires that the client's informed consent be "confirmed in writing[.]" Malpractice carriers typically have preferred template waivers that (a) acknowledge and explain the potential error but do not admit malpractice, (b) do not ask the client to waive the potential claim,[11] and (c) seek the client's informed consent to continue if the law firm is to remain on the matter concerned.[12]

Lawyers in this always difficult situation should seek available advice

within their law firms such as their firm general counsel and the claims management staff at their carrier to help them navigate how to approach the client, whether it makes sense for the firm to remain and, if so, drafting an appropriate waiver.[13]

In some instances, such as when a law firm is deep into a case, the client may want the firm to continue notwithstanding the potential claim.[14] In others, the client may have lost confidence in the law firm, declines to grant a waiver and instead hires replacement counsel. In that event, RPC 1.16(a)(1) and (3) generally require withdrawal (subject to any court approval if required by the rules of the forum)[15] and WSBA Advisory Opinion 201701 (2017) discusses the mechanics of withdrawal in the litigation context at length. In still others, the nature of the situation may be sufficiently uncomfortable that the law firm may wish to simply withdraw in favor of replacement counsel.

Summing Up

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

ABOUT THE AUTHOR

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[1] For an extended discussion of the difficulty of drawing this line, *see generally* Anthony V. Alfieri, *Law Firm Malpractice Disclosure: Illustrations and Guidelines*, 42 Hofstra L. Rev. 17 (2013) (collecting cases nationally).

[2] ABA Formal Op. 481 (2018) at 1-2 (footnote omitted).

[3] *Id*. at 2. As of this writing, Washington has not yet addressed this point by way of either a controlling appellate decision or a WSBA advisory opinion.

[4] *See Restatement (Third) of the Law Governing Lawyers* § 20 (2000). Washington RPC 1.4 is patterned on the corresponding ABA Model Rule.

[5] ABA Formal Opinion 483 (2018) addresses similar considerations in the context of data breaches.

[6] *See, e.g.,* New York State Bar Ethics Op. 1092, ¶ 9 (2016); Oregon State Bar Formal Op. 2005-61 at 3 (rev. 2016); Colorado Bar Formal Op. 113 at 4 (rev. 2015).

[7] ABA Formal Op. 481, *supra*, at 5 (footnotes omitted).

[8] *See generally* Benjamin P. Cooper, *When Clients Sue Their Lawyers for Failing to Report Their Own Malpractice*, 44 Hofstra L. Rev. 441 (2015) (collecting cases nationally on this point).

[9] A law firm that discovers a material error should also promptly inform its malpractice insurance carrier to avoid potential coverage issues triggered by unreasonable delay. *See, e.g., Felice v.* St. *Paul Fire and Marine Ins. Co.*, 42 Wn. App. 352, 358-360, 711 P.2d 1066 (1986) (lawyer's unreasonable delay in notifying malpractice carrier violated cooperation clause in the policy involved).

[10] *See generally* WSBA, *Legal Ethics Deskbook* § 11.2(3) (2020) (discussing material limitation conflicts).

[11] RPC 1.8(h)(2) places strict limitations on potential malpractice settlements unless the client involved is represented by independent counsel.

[12] *See, e.g.,* Oregon State Bar Professional Liability Fund template waiver at www.osbplf.org.

[13] If the client affected is still a current client of the firm, conversations with the firm's general counsel may not be shielded from discovery in subsequent malpractice litigation. *See Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005); *see also* ABA Formal Op. 08-453 (2008).

[14] Under the "continuous representation rule," the statute of limitation is tolled during the time that a law firm continues to represent the client in the matter involved. *See Janicki Logging & Constr. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001); *see also Burns v. McClinton*, 135 Wn. App. 285, 143 P.3d 630 (2008).

[15] RPC 1.16(a)(1) requires withdrawal when continuing would result in violating the RPCs (in this instance, an unwaived conflict) and RPC 1.16(a)(3) requires withdrawal when discharged.