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## **The Power of Words: Three Key Words for Risk Management**

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Many words describe key concepts for law firm risk management. Over the years, however, I have been struck with three in particular: trust; communication; and hubris. In this column, we'll look at each.

### ***Trust***

In a provocative article last year in the Georgetown Journal of Legal Ethics, Professor Robert Vischer ("Big Law and the Marginalization of Trust," 25 Geo. J. Legal Ethics 165 (2012)) explored the decline in trust between lawyers and clients as the emphasis for some shifted from the classic "attorney-client relationship" to a transactional model focused on the purchase and sale of technical services. It's not that trust is absent from the latter. I want a car mechanic that is both competent and that I trust. One of my law professors, however, was fond of reminding us that law, like medicine, frequently puts us at the intersection of some of the most difficult times in our clients' lives. Placing the accent on the "relationship" element of our dealings with clients won't prevent bar complaints or malpractice claims. But, fostering trust will hopefully encourage a more effective lawyer-client dynamic that leads to better results.

### ***Communication***

In the 1967 classic “Cool Hand Luke,” Strother Martin plays a prison warden with the famous line: “What we’ve got here is failure to communicate.” The same could be dubbed into many disciplinary and malpractice decisions. The comments to ABA Model Rule 1.4 on which our corresponding RPC is based include a pithy summary of our duty to communicate: “Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”

Although brief, the ABA comment underscores a central tenet of risk management: clients who understand and participate in key decisions are less likely to question them later. “Second guessing” is human nature. As noted, however, clients who share “ownership” with important decisions along the way are less likely to “point fingers” afterward if the outcome isn’t entirely as hoped. A key corollary is to document the decision at the time. A quick note or email back to the client confirming the decision can play an important role later as memories fade or plans don’t pan out.

### ***Hubris***

Dictionary.com defines “hubris” as “excessive pride or self-confidence; arrogance.” That short explanation neatly captures the twin essence of this word in the context of law firm risk management.

“Arrogance” is by far the more dangerous variant because it can infect entire organizations and blur their institutional decision-making as a whole. This is the “smartest guys in the room” syndrome: when organizations come to believe that the laws of gravity don’t apply to them—until they do. This facet of “hubris” is by no means unique to law firms. Organizations large and small in many walks of life provide ready, if dubious, examples. Dewey & LeBoeuf’s very public demise last year, however, highlighted that even the largest law firms are inherently fragile. That puts a premium on firms having leadership (and followership) who appreciate a strong risk management infrastructure. By that I don’t mean just having a set of conflict waiver forms and a copy of The Ethical Oregon Lawyer (although both are good starts). More importantly, it means encouraging lawyers to consult with their colleagues on tough issues and to “do the right thing.”

“Excessive self-confidence” can at first blush seem like a more benign strain of hubris. When applied to individual lawyers, however, it can be equally dangerous. It often includes the seductive thought that “only” that particular lawyer can handle a given case or transaction even in the face of, for example, a serious conflict. Individual lawyers in that position need to remain clear-headed enough to realize that they are not the only lawyer capable of handling the matter and they should “pass” in light of the conflict or other serious impediment.

## **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 NW Lawyer (formerly the 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.