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EVERYONE MAKES MUSTAKES: DEALING ETHICALLY WITH ERRORS AND LAPSES

WCBA Annual Ethics Seminar

November 5, 2019

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Ethical problems can come up even for the most diligent practitioners. After all, lawyers are human and humans make mistakes. Clients are human and humans get upset. And law is sometimes random—while we can make educated guesses, it's impossible to predict with certainty what a judge, jury, estranged spouse, disciplinary authority, or any other third party will do in any given situation.

The OLR annual report for Fiscal Year 2018-2019[1] shows that most common allegations in grievances were lack of diligence (20.86% of all grievances received); lack of communication (13.15%); misrepresentation and dishonesty (9.81%); and improper advocacy (9.44%). Errors form the basis of many malpractice claims, of course (which are outside the scope of this presentation) but interestingly, "mistakes" is not a category the Office of Lawyer Regulation tracks with regard to allegations made in grievances. This is likely because the Supreme Court Rules do not explicitly require attorneys' conduct to be free from errors (and they would set attorneys up to fail if they did include such explicit instruction); that said, SCR 20:1.1 (competence) requires attorneys to act with "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," and making mistakes can certainly implicate that Rule. However, only 3.7% of grievances received last year involved incompetence and it is impossible to know how many of those complaints involved errors.

This presentation will address how to handle errors and lapses—be they in fact, procedure, law, or judgment—in a way that mitigates risk and in accordance with the Supreme Court Rules.

[1]https://www.wicourts.gov/courts/offices/docs/olr1819fiscal.pdf.

Anyone can file a grievance about anything, so grievances may not be completely avoidable. However, there are certain things you can do during the course of representation to lessen that possibility, or reduce the potential liability should a grievance be filed.

As with most of the Supreme Court Rules, the sections relevant to this discussion are broad, with additional (though still limited) guidance provided by the ABA and Wisconsin Committee Comments[2]. While it is impossible to reach every potential problem area within a 50-minute CLE course, this presentation present a general overview. We invite your participation and feedback.

YOU MADE A MISTAKE: NOW WHAT?

In law school, it's drilled into our heads that things need to be perfect—not only do margins and fonts need to be just so (or you'll get docked half a letter grade per violation!), but your command of the facts and law needs to be indisputable. In practice, it's not so simple. Sure, you probably know that 12-point Times New Roman with 1-inch margins works for most courts (with appeals requiring bigger everything), but now, in addition to facts and law, you need to worry about jurisdiction, jurisdictional deadlines, and the "reply" versus "reply all" distinction.

When law students ask me about things I learned in practice that I wish I knew in law school, one of the first things I say is: "You will make mistakes. Hoo boy, you will make mistakes. They will be mistakes you never saw coming. The good news? Many errors are immaterial, or will go unnoticed until long after the matter is over; most of the rest are fixable to some degree, and those that aren't? Well, that's what malpractice insurance is for."

- **I'm Sorry, Your Honor, I Goofed**

There are all kinds of errors lawyers make in pleadings, briefs, and other documents, and most of them are minor and can be corrected (if they even need to be corrected). Errors in formatting or e-filing will get you a polite-but-stern call or note from the clerk, and you simply fix

[2] The entire SCR Chapter 20, including comments from the American Bar Association and the Wisconsin Committee, is available at https://docs.legis.wisconsin.gov/misc/scr/20.pdf.

the problem and move on. Similarly, a typo here and there in a lengthy brief is common; it's almost a rite of passage for a lawyer preparing for argument to notice a big glaring typo for the first time.

It may be embarrassing, but those sort of errors likely do not need to be addressed once the document is out of your hands—in fact, addressing them might draw more attention to them than just leaving them alone. The exception is if typo materially changes the meaning of a sentence. In that case, a corrected pleading (perhaps with a motion for leave to submit same) may need to be filed, especially if opposing counsel will or already has made hay out of your error. You shouldn't count on everyone assuming you meant what you meant.

Even larger errors, such as missing a non-jurisdictional deadline, can often be corrected through filing the appropriate motions or even by asking opposing counsel to stipulate to an extension. (Errors involving jurisdictional deadlines, however, cannot be fixed, and at that point your malpractice carrier will need to get involved.)

It's a different issue if you make a factual or legal reference in a court-submitted document or orally in court and later realize you were wrong—you transposed two numbers and your math in your damages calculation is off; you missed a "not" in a case holding; your client gave you bad information and only corrected you after you submitted the document. Even if the mistake isn't yours, your name is at the end of the document and you are responsible for correcting it.

SCR 20:3.3 governs "candor toward the tribunal." It reads, in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
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> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

This section draws a distinction between knowingly making *any* false statement of fact or law, and knowingly failing to correct a false statement of *material* fact or law. In other words,

lawyers are not allowed to lie in court about anything (and I would hope this is not a new revelation for anyone here); strictly speaking, if you lie to a judge about having oatmeal instead of Froot Loops for breakfast, that is a violation of SCR 20:3.3. But if you present a statement of law or fact and later realize that the statement is false, corrections need to be made only if the statement is material. Materiality is, of course, a case-by-case determination, and while there is no bright-line Supreme Court Rule as to what is "material" for the purpose of this Rule (it is not included in SCR 20:1.0's recitation of definitions and there are no relevant comments), generally, if the fact or law is of consequence to the determination, it will likely be "material" insofar as the Rule is concerned.

If the error is discovered while you are still in court, an on-the-record correction may be fine; if it is discovered later, a letter or a corrected pleading may be necessary. Yes, this is more work, and if it's your mistake, the client should not be charged for correcting the mistake.

- **Um, Yeah, Can I Get that Confidential Material Back?**

This is a mistake that has become increasingly common with electronic discovery and e-mail—inadvertent disclosure of confidential information. An attorney-client privileged letter ends up buried in the middle of a large document production. Someone sends an e-mail to the wrong "David." Or, an attorney sends opposing counsel a document provided by her client and later learns that the client intended the material to be privileged communication, not a discovery response.

Wis. Stat. §§ 905.03(5) and 905.11 specify that inadvertent disclosure of privileged information (in attorney-client contexts or otherwise) does not waive attorney-client privilege; only voluntary disclosure of the contents or a significant part of them waives the privilege. In 2004, *Harold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr*., 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794 clarified that even when an attorney voluntarily produced a document that he or she did not recognize as privileged, the privilege is not waived. While the attorney voluntarily disclosed the documents, the clients did not intend or agree for them to be disclosed, and as the clients held the privilege, only they could waive it.[3]

However, while inadvertent disclosure of privileged material or voluntary disclosure of material not recognized as privileged by the lawyer may not waive the privilege in Wisconsin, as will be discussed below, SCR 20:1.6(d) requires lawyer to "make reasonable efforts to prevent the

[3] Federal courts may differ significantly, so be careful if you practice there.

inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

But "reasonableness" is a case-by-case determination. Everyone should, at a minimum, have safeguards such as passwords and good document review. Individuals in certain practices such as health care, employment, or personal injury may have heightened duties when dealing with private information such as medical records disclosed pursuant to HIPAA releases. Additionally, if a lawyer's computer system is hacked or a paper file stolen, Wis. Stat. § 134.98 may impose additional duties to notify people whose information may be affected.

But what happens if you realized you sent—or received—privileged information you were not supposed to? The *Sampson* case led to numerous articles and practice pointers, and some best practices were spelled out in a *Wisconsin Lawyer* article.[4] In relevant part, the article stated:

> 8) If the producing lawyer discovers that a privileged document was produced, the lawyer should immediately demand in writing the return of all copies of the document and the destruction of any notes or memos created concerning that document. The producing lawyer also should insist that the receiving lawyer provide written confirmation that the privileged document was returned and that any related notes and memos were destroyed.
>
> 9) If an attorney receives an unauthorized attorney-client communication, such as a document inadvertently faxed by opposing counsel or an email forwarded by opposing counsel that is intended for his or her client, the receiving attorney should notify the sender immediately and ask for direction as to what do with the document. This is consistent with ABA Formal Opinion 92-368 and with the *Sampson* decision.

In other words, as much as someone might want to, the rules do not permit lawyers to take advantage of mistakes of their adversaries when it comes to receiving unauthorized material. The *Sampson* court acknowledged that:

> the information obtained from the documents before the plaintiffs made any objection to the disclosure cannot easily be erased from the minds of defense counsel or the defendants with whom the documents were shared. The defendants argue that it is not reasonable or practical to try to "unring the bell." But a return of

[4] "Upholding the Sanctity of the Attorney-Client Privilege," Steven Nelson & Jane Schlicht, December 2004.

> the documents and the circuit court's prohibition of their use is the only remedy available in this proceeding.

Sampson at ¶ 48. However, even if privileged information can be successfully "clawed back" after inadvertent or mistaken release and not used at trial, the information cannot be erased from the minds of the recipients. Also, clients tend to get angry when confidential information gets out even if there's no real ill effect, and angry clients are prone to filing grievances.

- **Can this be our little secret?**

Regardless of where you made a mistake beyond a meaningless typo, you may eventually need to tell someone, unless it's a mistake that can immediately be corrected with no ill effect (in which case, make the correction and move on). For how to tell the court you erred, see above. For other errors, see below.

Do I need to tell my boss? If you are a junior lawyer working for a senior colleague, you may have a policy at work that requires you to inform your supervisor of mistakes you made. It's hard, I know—you're admitting you messed up to someone who controls whether you have a job next week. But, from a risk mitigation standpoint, it's important—your supervisor will need to take protective or remedial measures, and might need to put the malpractice carrier on notice. And even if it's not policy, it's almost always better to tell your boss about a mistake before they find out from someone else (and they likely will find out).

Do I need to tell my clients? It depends. While there is no bright line Supreme Court Rule as to what constitutes an error or omission requiring disclosure to the client, it is not necessary for lawyers to tell their clients about every error. Generally, mistakes that do not adversely affect the case, strategic decisions that ultimately did not work but were reasonable given the circumstances, and errors that have been remedied do not need to be disclosed (though clients should not be charged for work made necessary by the attorney's error or omission).

On the other hand, Wisconsin Ethics Opinion E-82-12 provides that attorneys have a duty to tell clients about omissions that are significant enough to give rise to a potential malpractice claim. The State Bar Professional Ethics Committee came to this conclusion in light of the Supreme Court Rules (as written at the time) requiring attorney competence, assistance in

maintaining the integrity of the profession, and precluding the attorney from limiting his or her liability to a client for malpractice.

A later article, "What to Do After Making A Serious Error," was authored by State Bar Ethics Counsel Tim Pierce and now-retired WILMIC Vice President of Claims Sally Anderson and was published in the February 2010 *Wisconsin Lawyer.* Pierce and Anderson add to that analysis the fact that SCR 20:1.4 requires lawyers to reasonably explain matters to their client as necessary to permit the client to make informed decisions, and that SCR 20:1.7 provides that a conflict of interest exists if there is a significant risk that a lawyer's personal interest may materially limit representation of a client:

> When a lawyer commits an error giving rise to a possible malpractice claim, the client must make important decisions as to whether to pursue the possible claim against the lawyer, immediately or at a later date, and whether to continue the representation, and the lawyer must provide the client with information sufficient to ensure that the client is reasonably informed about these matters.

Even given a duty to report to the client, the lawyer should refrain from confessing malpractice liability to the client or otherwise discussing the merits[5] of filing a grievance or malpractice suit.

When in doubt, your malpractice carrier is a good resource—chances are, insured lawyers have a duty to put it on notice if they receive information that would lead a reasonably prudent lawyer to believe a claim could result, and failing to do so can imperil coverage if a claim does follow. Even if you're not sure what to do, or if (or how) you should approach your client, they may be able to help.

Do I need to tell the OLR? No. The Supreme Court Rules do not require self-reporting of anything other than a conviction for a crime. SCR 20:8.3 requires lawyers to report the professional misconduct of others, but only when they have knowledge of a violation of the Rules that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" SCR 20:8.3 may trigger a duty for lawyers to report someone in their own firm, but

[5] Attorneys do have a duty to refer clients (or anyone else) to the OLR if they express a desire to file a grievance. SCR 21:1.15(3).

most errors are not at the level of raising a "substantial question" about someone's character and fitness to practice, and they can be handled as internal matters.

If, however, a grievance is filed and you are responding to an investigation, you may need to admit your mistake to the OLR at that point. (See Richard Cayo's outline from the 8:30 presentation for more on that.)

- **Talking the talk**

One of the hardest parts of any attorney's job is delivering bad news, whether it's to our colleagues or our clients. Most of us are not trained to do this well. We learn on the job and hope we're doing it right. While it is human nature to want to avoid these conversations, these are conversations we have to have.

In some ways, it may be easier to admit a "mistake" in the traditional sense (a blown deadline, a misunderstanding of law), because those can be clear cut and relatable. Either the deadline was blown or it wasn't, and the consequences are spelled out in statutes. A mistake in judgment is harder, in my opinion—you went over the options, picked one, and it failed spectacularly. [6] Clients are relying on you to exercise your judgment, and it's hard for them to understand that judgment isn't foolproof.

With regard to clients, SCR 20:1.4, Communication, tells us that lawyers need to "promptly" inform clients as to decisions or circumstances requiring informed consent, and to otherwise keep them "reasonably" informed about the status of their matter. These terms are vague; "promptly" is not defined in the Supreme Court Rules and "reasonably" is rather circularly defined as "the conduct of a reasonably prudent and competent lawyer."

This is also a situation where lawyers sometimes want to instruct their paralegals—who may have had more face time or phone time with the client and may have a better rapport overall—to deliver bad news for them. In most circumstances, this is not a good idea—even if all the paralegal is doing is relaying information or sharing a document from the court, it may veer into

[6] Mistakes in judgment don't usually form the basis for malpractice actions or even for discipline—attorneys are allowed to use their professional judgment, take risks, and so forth. However, mishandling judgment calls (failing to communicate, for instance, or failing to get informed consent when needed) can give rise to discipline.

the "practice of law" category and is almost certainly subpar client service. The client hired you for a reason, and you owe it to them to be honest

While you should not unduly delay communicating bad news to a boss, partner, or client, in most circumstances, it does not mean you have to rush in and blurt it out immediately. If the news is not so urgent that it has to be delivered right away, you have time to write a script, if that will help you, or at least write down salient points. The conversation can be rehearsed. Keep a record of those conversations, however they occur.

On a similar note, SCR 20:2.1 tells us we need to render "candid" advice, and the American Bar Association comment is instructive: "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

In other words, be honest. Be straightforward. When talking to clients, use language that the client can understand, and don't attempt to minimize something that the client likely feels is catastrophic. "Look on the bright side" is only welcome when there is a bright side.

When talking to bosses, what you say and how you say it is likely more an HR issue than an ethical issue (and it's hard, I know); but as stated above, even if there is no stated policy, it's likely in your best interest to tell someone.

And because it's hard, I'm going to turn attention to the bosses for a minute—I encourage you to create a culture of disclosure at your firm, so that when there are problems, they have a better chance of being addressed in time to avoid or mitigate the consequences, and so the insurance carrier can receive notice as appropriate, and so your associate can learn and do better next time. If your junior colleagues fear dire consequences, they may not come forward and the exposure to the firm is that much greater.

Also, bosses can be held responsible for the behavior of a junior lawyer if they order a subordinate to violate the rules; ratify a known violation; or fail to take reasonable corrective action if they know of the conduct when consequences of a violation can be ratified or mitigated (SCR 20:5.1), so if you are a supervisory lawyer and you come to know of an error, know your responsibilities as well.

CONCLUSION

In many cases, reasonable and ethical practitioners will have different interpretations and different answers to the questions posed; it is important to remember that such issues should be resolved "through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules." (Preamble to SCR Chapter 20, ¶ 9.)

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