Surviving a Screwup

by Brian Pollock

> *A Goatherd had sought to bring back a stray goat to his flock. He whistled and sounded his horn in vain; the straggler paid no attention to the summons. At last the Goatherd threw a stone, and breaking its horn, begged the Goat not to tell his master. The Goat replied, "Why, you silly fellow, the horn will speak though I be silent."*
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> *Aesop's Fables*
> "The Goat and the Goatherd"

One of our strongest instincts, present from early childhood, is to hide our mistakes. Why? Embarrassment, desire to protect our reputation and please those important in our lives, fear of the consequences, or some combination thereof are the likely explanations.

As lawyers, we find the instinct constantly lurking because ours is a profession ripe with chances to make mistakes. Fortunately most of those mistakes are small and of little consequence, or can be easily remedied, but such is not always the case. Sometimes we make mistakes that subject us to potential malpractice suits. And frequently lawyers and law firms mishandle the situations presented by such mistakes.

For example, a lawyer in one case accepted a retainer from the client to file a wrongful termination lawsuit on his behalf. The lawyer then failed to file suit, and the statute of limitations expired. To cover up these failures, the lawyer misrepresented to the client that state and federal actions had been filed, that a default judgment of $25,000 had been entered in the state action, and that a settlement had been reached in the federal action calling for a $57,000 lump-sum payment and $20,000 for the next ten years. The lawyer then provided a series of excuses to the client over the course of the next 11 years as to why he had not received any of the money. The lawyer even went so far as to represent the client for free in other matters during that 11-year period, telling the client that he would be paid out of the monies to be received eventually from the wrongful termination actions. *Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999).

Although the facts of the above case are particularly egregious and we would hope that we know not to act in such a manner, another, more benign example involved a lawyer who filed a lawsuit in the wrong jurisdiction, only to have the case dismissed for lack of personal jurisdiction after the statute of limitations had run. The lawyer notified his clients of the dismissal and discussed with them the possibility of refiling the case in the proper jurisdiction, but he did not tell them that the case was time-barred or that they had a potential malpractice claim against him. The lawyer was subsequently disciplined for failing to handle his mistake properly. *In re Hoffman*, 700 N.E.2d 1138 (Ind. 1998).

Such mishandling of mistakes by lawyers is not, unfortunately, an uncommon occurrence. I have seen such foul-ups on a number of occasions. For example, in one case an action was filed late, resulting in a dismissal. The law firm, however, did not tell its client that a motion to dismiss had been filed and delayed telling the client that the case had been dismissed. In another case, a law firm made a drafting error in a complex commercial contract. The law firm proceeded to represent the client for more than three years in ensuing litigation that involved in large part the contractual provision containing the drafting error. Not only did the firm fail to disclose its mistake to the client during that time period, but it also boasted to the client about the great job it had done drafting the provision in question. A multimillion-dollar judgment was eventually entered against the client.

The potential consequences of improperly handling our mistakes are varied but can be significant. For example, we may subject ourselves to disciplinary actions, additional causes of action by our client, and fee disgorgement.

Brian Pollock is with Lewis and Roca LLP in Phoenix, Arizona.

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So what do we do if we have made a mistake? In some cases, we can simply correct the error and that is the end of it. Our obligations, however, may go so far as to include a duty to withdraw from the representation and inform the client that it has a potential malpractice claim against us.

When a lawyer realizes he has made a mistake, he needs to keep in mind potential obligations to both (1) his client and (2) his malpractice carrier. First and foremost, of course, is the client.

Many ethical duties to a client are potentially implicated in the aftermath of a mistake, such as the prohibition against settling potential malpractice claims with unrepresented clients and former clients. The two primary ones to keep in mind, however, are the duties to keep the client reasonably informed and to avoid impermissible conflicts of interest.

We have an ethical obligation to keep our clients "reasonably informed about the status of the matter" we are working on for them. Model Rules of Prof'l Conduct R. 1.4(a)(3) (2002). To meet this obligation, lawyers must disclose information material to the representation, which can certainly include the consequences of a mistake made by the lawyer. A lawyer's failure to notify his clients of a pending motion to dismiss or a subsequent order of dismissal for failure to prosecute constitutes a violation of his ethical duty to keep the client informed. *In re Burtch*, 770 P.2d 174, 176 (Wash. 1989). But does our duty to the client end with disclosure of the consequences of our mistake, or do we need to tell the client that we made a mistake?

The Pennsylvania Bar Association has said that a lawyer need only disclose to the client the consequences of his mistake and not the mistake itself. Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp., Informal Op. 97-56 (1997). The subject of the opinion was a lawyer who represented a client in a personal injury case that was dismissed for failure to prosecute. The lawyer advised the client of the pending motion to dismiss, the dismissal order, and the consequences of the dismissal. The lawyer's question for the bar was whether he also had a duty to advise the client that he may have committed malpractice and that the client might have a claim against him. The bar concluded that he did not, reasoning that he did not generally represent the client and that the scope of the engagement was limited to litigation of the personal injury lawsuit. As a result, the bar said, the lawyer had a duty to keep the client informed only as to material developments in that case, which he had done by explaining the consequences of the dismissal for failure to prosecute.

The Pennsylvania bar's opinion, however, is in the minority on this question. According to the Restatement: "If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client." Restatement (Third) of the Law Governing Lawyers § 20, cmt. c (2000) . Likewise, the New Jersey Supreme Court has held that an attorney "has an ethical obligation to advise a client that he or she might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests." *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (citing ethical rules 1.4 and 1.7), *abrogated on other grounds by Olds v. Donnelly*, 696 A.2d 633 (N.J. 1997). *See also, e.g.*, *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) (holding lawyer obligated under ethical rule 1.4 "to promptly notify his client of his failure to act and of the possible claim his client may thus have against him").

In determining when a lawyer must disclose his mistake to the client, some authorities set the threshold as low as when malpractice simply "may have occurred." N.J. Eth. Op. 994 (1998); Wis. Eth. Op. 82-12. The Restatement, however, says that disclosure need be made only if the lawyer's conduct gives the client "a substantial malpractice claim." Restatement (Third) § 20, cmt. c.

In addition to the duty to keep the client informed, a lawyer's duty to avoid conflicts between her own and her client's interests can come into play after a lawyer has made a mistake. A "conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Model Rules of Prof'l Conduct R. 1.7(a)(2) (2002). For example, the lawyer in *In re Hoffman*, discussed above, was publicly reprimanded for his improper handling of the conflict created by his mistake in allowing the statute of limitations to expire before filing suit in the proper jurisdiction. The court concluded that his continued representation of the clients, without adequate disclosure of his mistake and their potential malpractice claim against him, violated Model Rule 1.7, given the possibility that his representation might be materially limited by his own personal interests.

Not every mistake by a lawyer, however, will create a conflict of interest. *In re Knappenberger*, 90 P.3d 614, 622 (Or. 2004). If a mistake can be corrected (e.g., Federal Rule of Civil Procedure 6(b) permits blown deadlines to be extended upon a showing of "excusable neglect") or has no meaningful consequences for the client (e.g., the loss of a duplicative claim or defendant), no conflict of interest exists between lawyer and client because their interests do not diverge.

So at what point does a conflict exist? Most courts and other authorities are in general agreement that some combination of the following factors is relevant to this determination:

- How clear cut is it that the lawyer was negligent?
- Can the error be remedied without harm to the client?
- How severe are the potential consequences of the mistake for the client?

These factors boil down to the same ultimate question: What is the likelihood of a substantial malpractice claim against the lawyer as a result of the mistake in question?

Using this standard, the extreme example is one where not only has a lawyer erred but the client has also threatened a malpractice claim. A clear conflict exists at that point because lawyer and client are direct adversaries. Such a threat by the client, however, is unnecessary to create a conflict. The greater the risk that a lawyer will face a substantial malpractice claim due to her error, and the greater her personal interest in the client's ongoing matter, the more difficulty she will have providing impartial advice, and the more likely it is that her representation of the client will be materially limited. Although we might argue that the interests of lawyer and client are aligned because they are both best served by a favorable outcome in the

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underlying matter, this is not necessarily true.

A lawyer's personal motivations can crop up in a variety of decisions. For example, the lawyer may be motivated by her personal interests to settle the client's litigation to try to hide her mistake or to mitigate the potential damages available against her in a subsequent malpractice case. On the other hand, the lawyer may be personally motivated to forgo settlement in order to vindicate her own conduct. In either case, the lawyer's best interests may arguably be in conflict with the client's.

So what are the consequences of mishandling duties to the client in the face of a mistake? Unfortunately, they can be drastic. In addition to the malpractice claim already staring the lawyer straight in the face because of the mistake itself, she risks opening herself to consequences ranging from disciplinary proceedings by the state bar, to increased damage claims in the malpractice suit, to disgorgement of the client's fees.

Lawyers have been disciplined for mishandling the aftermath of their mistakes and, in some more egregious instances, have even been suspended. In *Columbus Bar Ass'n v. Bowen*, 717 N.E.2d 708 (Ohio 1999), the Ohio Supreme Court imposed a six-month suspension on a lawyer who avoided his client's letters and telephone calls when her lawsuit was dismissed with prejudice for failure to prosecute the action. He did not inform the client of the dismissal until two years later, after she had filed a grievance with the state bar. *See also, e.g.*, *In re Samai*, 706 N.E.2d 146 (Ind. 1999) (18-month suspension). Lawyers, though, have been disciplined for much more benign ways of dealing with their mistakes.

The lawyer in *In re Hoffman*, 700 N.E.2d 1138 (Ind. 1998), filed a personal injury lawsuit in the wrong court. After the statute of limitations expired, the lawsuit was dismissed for lack of personal jurisdiction. Hoffman notified his clients of the dismissal and had some discussions with them about refiling the case under an Illinois savings statute, but the clients learned from another source that the case was time-barred. Some two years later, Hoffman told the clients they had a potential malpractice claim against him. *Id.* at 1138-39.

As a result of Hoffman's conduct, the Indiana Supreme Court publicly reprimanded him. The court found violations of two ethical rules. First, Hoffman violated Rule 1.4 by failing to "explain adequately to his clients the effect of a dismissal of the tort claim"—that the case was time-barred. *Id.* at 1139. Second, Hoffman violated Rule 1.7(b) because "he continued to represent the clients after it became apparent that the representation might be materially limited by [his] own interests." *Id.* Namely, he became personally interested as a result of his own potential malpractice.

In addition to possible disciplinary proceedings, hiding a mistake from the client can increase both the likelihood of and the repercussions from a malpractice suit once the mistake is discovered, especially with a longstanding client with whom the lawyer has built goodwill. Who would you be more apt to sue—someone who fully discloses to you a potential problem and her potential responsibility, or someone caught hiding the problem from you? In addition to potentially increasing the likelihood of a malpractice suit, a lawyer weakens his position in any such lawsuit by opening himself to additional claims, increased damages, fee forfeiture, longer statutes of limitation, and an uphill battle with a more skeptical jury.

Malpractice complaints against lawyers commonly include breach of fiduciary duty claims. Courts have dismissed such claims as redundant to the extent they are based on the same conduct supporting a negligence claim. *See, e.g.*, *Aller v. Law Office of Carole C. Schriefer, PC*, 140 P.3d 23, 27 (Colo. Ct. App. 2005). Where there are separate allegations of the lawyer's inappropriate handling of a conflict of interest, however, courts are willing to allow a separate claim for breach of fiduciary duty to go forward. *See, e.g.*, *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189-91 (Tex. Ct. App. 2002). A lawyer's improper handling of a mistake could lead to just such a claim.

Aside from the advantage of putting before the jury the juicy issue of the lawyer's alleged ethical breach (e.g., having an ethics expert testify), a plaintiff with a breach of fiduciary duty claim may have an easier time proving her case. For example, some courts have held that the causation standard for a breach of fiduciary duty claim is less stringent than that for a negligence-based malpractice claim. *See, e.g.*, *Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 927 (S.D.N.Y. 1997).

An attorney's failure to properly handle his mistake can also open him up to a much wider range of available damages to the client/plaintiff. Emotional distress and punitive damages are two examples.

The majority rule is that emotional distress damages are unavailable to a plaintiff in a run-of-the-mill legal malpractice action. *Akutagawa v. Laflin, Pick & Heer*, 126 P.3d 1138, 1143 (N.M. Ct. App. 2005). As explained by one court, damages for emotional distress cannot be recovered in a legal malpractice action without an "intentional infliction of emotional distress or some heightened level of culpability resulting in severe distress." *Id.* at 1144. A lawyer's breach of fiduciary duties to the client by failing to disclose a mistake, however, could constitute just the type of conduct that would convince a court to allow the client to seek emotional distress damages.

In *McAlister v. Slosberg*, 658 A.2d 658 (Me. 1995), the plaintiff retained the defendant/lawyer to appeal a judgment entered against the client in a paternity suit for the payment of child support. The appeal was dismissed because the lawyer failed to file a timely appellate brief. The lawyer, however, did not inform his client of that dismissal for two years. *Id.* at 659-60. In the resulting malpractice action, the client sought recovery for both the child-support obligations that the lawyer was to have appealed and for the alleged emotional distress he suffered because of the lawyer's conduct. The trial court entered judgment as a matter of law against the plaintiff on his claim for the child-support obligations because he failed to prove that he would have succeeded on that appeal, but let the claim for emotional distress damages go to the jury, which awarded about $30,000. *Id.* These rulings and the jury verdict were upheld on appeal. The court explained that the allegations of emotional distress resulting from the defendant's "intentional misrepresentations concerning the status of the appeal" were sufficient to get to the jury. *Id.* at 660. In sum, then, had the lawyer simply disclosed his mistake to the client, he would have incurred no liability. *See also Beis v. Bowers*, 649 So. 2d 1094, 1097 (La. Ct. App. 1995) (no proof of damages for loss of underlying claim due to lawyer's negligence, but claim for emotional distress damages allowed because lawyer had not disclosed problem to client).

Similarly, an ordinary negligence-based malpractice action is generally not going to subject an attorney to punitive damages. If a plaintiff, however, can pile on allegations that the lawyer breached his fiduciary duties and in particular concealed his wrongdoing, punitive damages become more likely. Ronald E. Mallen & Jeffrey M. Smith, 3 *Legal Malpractice* § 20.16, at

53 (2006 ed.) ("A breach of a fiduciary obligation often is alleged to support a punitive damage claim.").

Metcalfe v. Waters, 970 S.W.2d 448 (Tenn. 1998), provides a good example of this increased exposure. In *Metcalfe*, the lawyer was retained to pursue a personal injury action but, through a series of errors, allowed the statute of limitations to expire before he properly filed suit. *Id.* at 449. In the ensuing malpractice action, the jury returned a verdict against him that included $100,000 in punitive damages. *Id.* at 450. The verdict was upheld by both the trial court and the Tennessee Supreme Court in large part because the lawyer had lied to the clients for several months about the status of the case, telling them it was still pending after it had been dismissed. When he finally informed them of the dismissal, he withheld the reason for the dismissal and told them it was not worth appealing. *Id.* at 449-51. The Tennessee Supreme Court reasoned that "the harm resulting from the original wrongdoing, as in the present case, may be exacerbated by intentional, fraudulent, malicious, or reckless efforts that prevent the plaintiff from taking immediate corrective action," and that such conduct should be punished for the purpose of deterring others. *Id.* at 452. Other courts have reached similar conclusions regarding attorneys' concealment of their wrongdoings from the client. *E.g.*, *Asphalt Eng'rs, Inc. v. Galusha*, 770 P.2d 1180, 1183 (Ariz. Ct. App. 1989) (citing evidence of attorney's efforts to conceal malpractice in support of punitive damage verdict).

The increased exposure to punitive damages is particularly significant for lawyers in states with a public policy forbidding a lawyer from insuring against punitive damages. *E.g.*, *Industrial Risk Insurers v. Port Auth. of N.Y. and N.J.*, 387 F. Supp. 2d 299, 311 (S.D.N.Y. 2005) (noting such policy under New York law). In such states, a lawyer's improper handling of a mistake could subject him to significantly increased *personal* exposure.

To make matters worse, improper handling of a mistake can extend the limitations period for the client to sue the lawyer. If the client can fashion a claim that the lawyer deliberately breached her fiduciary obligations, he may be able to convince a court to apply the jurisdiction's statute of limitations for fraud claims, which is generally longer than that for negligence claims. In addition, an attorney's failure to disclose her mistake to the client can toll the statute of limitations. For example, the court in *Crean v. Chozick*, 714 S.W.2d 61 (Tex. Ct. App. 1986), reversed a summary judgment on limitation grounds in the defendant/lawyer's favor, ruling that a lawyer's failure to disclose facts material to the representation operates to toll the statute of limitations until the attorney-client relationship ends. *Id.* at 62. *See also, e.g.*, *United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass*, 624 F.2d 145, 148-49 (10th Cir. 1980) (tolling statute of limitations where law firm concealed its mistakes).

In the end, all these possible ramifications may be overshadowed by the simple effect that the lawyer's actions will have on a jury. Conflict-of interest claims, in general, provide fodder for malpractice plaintiff's lawyers. As one court put it: "Viewed through the lens of a potential conflict of interest, defendants' otherwise defensible tactical decisions take on a more troubling gloss, and suggest at least the possibility that defendants' divided loyalties substantially contributed to [their clients'] defeat. . . ." *Re v. Kornstein Veisz & Wexler* 958 F. Supp. at 927-28. And like a parent more upset about a child's cover-up than the mistake the child was trying to hide in the first place, a jury presented with allegations that a lawyer hid his alleged mistake is more likely to hold the lawyer liable for the mistake and to be skeptical of anything else the lawyer has to say.

Another very real danger for a lawyer who mishandles her obligations to the client following a mistake is fee forfeiture or disgorgement. "Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interest." *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1285 (Pa. 1992). *See also* Restatement (Third) § 37 (2000) (providing for fee forfeiture if the lawyer "engag[ed] in clear and serious violation of duty to a client"). The basic rationale for disgorgement or forfeiture of fees is that lawyers render services to clients in a relationship of trust and should be denied compensation for those services if they breach their clients' trust.

The threat of fee forfeiture can be a powerful tool for malpractice plaintiffs.

The threat of fee forfeiture or disgorgement can be a powerful tool for malpractice plaintiffs for a couple of reasons. First, a majority of courts have ruled that a client need not prove that an attorney's breach of fiduciary duty caused it any damages to be entitled to this remedy. *See, e.g.*, *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996). As one court reasoned: "forfeiture of an agent's compensation is not mainly compensatory. . . . An agent's breach of fiduciary duty should be deterred even when the principal is not damaged." *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999). *See also* Restatement (Second) of the Law of Agency § 469, cmt. a (1958) (agent's forfeiture of fees not dependent upon harm to principal).

Second, the amount of money involved can be significant. Although some courts have held that the fees subject to disgorgement are limited at most to those incurred after the actual conflict of interest arose, *Blecher & Collins, P.C. v. Northwest Airlines, Inc.*, 858 F. Supp. 1442, 1457 (C.D. Cal. 1994), other courts have held that the lawyer must disgorge *all* fees earned during the course of the representation, even those earned before the conflict arose. *Pessoni v. Rabkin*, 633 N.Y.S.2d 338 (App. Div. 1995). *See also* Restatement (Third) § 37, cmt. e (2000) ("Ordinarily, forfeiture extends to all fees for the matter for which the lawyer was retained."). For example, the Washington Supreme Court in *Eriks v. Denver*, 824 P.2d 1207 (Wash. 1992), upheld the lower court's ruling that the lawyer needed "to return all of the fees, plus prejudgment interest." *Id.* at 1213.

Finally, failure to disclose a mistake can jeopardize the law firm's attorney-client privilege for communications relating to the mistake. Courts have generally held that the attorney-client privilege protects internal law firm communications (e.g., with a firm's ethics committee or general counsel) that were engaged in for the purpose of obtaining legal advice. *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994); *see also* Restatement (Third) § 73, cmt. c (2000). A handful of courts, however, have concluded that without a conflict waiver from the client, internal firm communications that

took place during the representation may not be protected. *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002); *Koen Book Distrib. v. Powell, Trachtman, Logan, et al., P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989); *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866 (Wash. Ct. App. 2005).

The *Koen Book* case provides a good example of the reasoning employed by these courts. The law firm in that case had been representing clients in a bankruptcy proceeding. During the course of that representation, the clients informed the firm that they were unhappy with the firm's services and were considering a malpractice suit. The representation, however, continued for an additional five weeks before the clients terminated the relationship. During that five-week period, several lawyers working on the plaintiffs' bankruptcy matter consulted with another lawyer in the firm on ethical and legal issues raised by the threat of a malpractice suit. In the subsequent malpractice action, the plaintiffs sought discovery of internal firm documents generated during that period. *Koen Book Distrib.* 212 F.R.D. at 283-84.

The court compelled the firm to turn over the documents in question. *Id.* at 286-87. The court concluded that, because a law firm owes a fiduciary duty to an existing client and cannot engage in conflicting representations without a waiver from the client, the attorney-client privilege for internal firm communications is vitiated if the communication "implicates or creates a conflict of interest" with the client. *Id.* at 285 (quoting *In re Sunrise Sec. Litig.*, 130 F.R.D. at 597). The court then concluded that a series of e-mails "concerning if and how to continue to represent the clients and how to respond to [their] communications" were discoverable because they were permeated by consideration of how best to position the firm for the threatened malpractice action and, thus, established a conflict between the firm and the clients. *Id.* at 286. Although noting the predicament the firm faced during the five-week period in question, the court suggested that the firm could have avoided the compelled production of its internal firm documents by taking one of two courses of action: (1) promptly seeking to withdraw as counsel upon receiving the clients' threat of a malpractice action or (2) promptly seeking "the clients' consent to continue the representation 'after full disclosure and consultation.'" *Id.* (quoting Rule 1.7 of the Pennsylvania Rules of Professional Conduct).

While a number of commentators have criticized the conclusion reached in *Koen Book* and other cases finding waiver of the privilege for internal firm communications in regard to current clients, *see, e.g.*, Elizabeth Chambliss, "The Scope of In-Firm Privilege," 80 *Notre Dame L. Rev.* 1721, 1733-48 (2005), no published contrary decision yet exists. (A recent unpublished decision out of the Northern District of California, *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989 (Feb. 21, 2007), does try drawing a line more protective of such internal firm communications by preferring a rule that is "consistent with a law firm in-house ethical infrastructure.") Therefore, a law firm trying to deal with a mistake it made for a current client is left with the two choices laid out by the court in *Koen Book* if it wishes to avoid the risk of subsequent disclosure of its internal communications regarding the mistake.

In contrast to the firm's communications in *Koen Book*, internal communications with the firm's general counsel or ethics advisor for the purpose of determining the firm's ethical obligations to the client should not be subject to discovery under the case law discussed above because such communications do not create any conflict of interest between the firm and the client. The firm is required to adhere to the rules of professional responsibility in representing the client; thus its "consideration of its own legal and ethical obligations in connection with its representation of one or more clients cannot be said to implicate a 'differing interest' that will adversely affect the lawyer's exercise of professional judgment nor the loyalty due a client." N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 789 (2005). Of course, the conclusions reached as a result of those communications may very well need to be communicated to the client. *See id.* (concluding, though, that firm owes no obligation to disclose to client the fact that firm consulted its in-house counsel about issue); *see also Marland*, 2007 WL 578989 at *8 (requiring disclosure of conclusions regarding ethical issues).

Although our ethical duties to our clients obviously take center stage, lawyers can face equally harsh consequences by failing to meet their obligations to malpractice carriers in the face of a mistake. No one wants to face a malpractice suit, but most of us are at least protected from direct liability by professional liability insurance coverage. But a lawyer who does not properly report her mistake to the carrier faces the prospect of losing that protection.

Two typical provisions of a professional liability insurance policy potentially impose an obligation on a lawyer to report her mistake to the carrier. The first is a provision requiring notice of potential claims upon "becoming aware of any negligent act, error, omission or Personal Injury . . . which *could reasonably be expected to be the basis of a Claim.*" *Sirignano v. Chicago Ins. Co.*, 192 F. Supp. 2d 199, 202 (S.D.N.Y. 2002) (emphasis added). The second provision generally found in professional liability insurance policies (which are usually claims-made policies) is exclusion of coverage in certain circumstances for claims arising out of conduct that predated the policy period. Such a provision is likely to preclude coverage for any error or omission that the lawyer "*knew or could have reasonably foreseen*" might be the basis of a claim. *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 304 (3d Cir. 2001) (emphasis added). Both provisions typically invoke the same threshold for imposing a reporting obligation on the lawyer, namely, whether the mistake is one that under the circumstances would have led an objectively reasonable lawyer to believe in the possibility of a resulting malpractice claim. *See, e.g.*, *Cade & Saunders, P.C. v. Chicago Ins. Co.*, 332 F. Supp. 2d 490, 497 (N.D.N.Y. 2004).

In cases of blown statutes of limitation and other deadlines, courts have found that a lawyer needs to report the matter to her insurance carrier no later than the point in time in which she learns of the resulting dismissal, and possibly earlier. In *Bellefonte Insurance Co. v. Albert, P.C.*, 472 N.Y.S.2d 635 (App. Div. 1984), the lawyer filed a wrongful death action on his client's behalf in July 1978, months after the statute of limitations had expired. In their answer, the defendants asserted the statute of limitations as a defense. The defendants moved for summary judgment on statute of limitations grounds in September 1979, and the case was dismissed on that basis in June 1980. The lawyer then took an appeal and did not notify the carrier of a potential malpractice claim until January 1982, two months after the appeal was denied. In a coverage action brought by the lawyer's insurance carrier, the court held that the lawyer had failed to give timely notice of the potential claim and, therefore,

denied coverage. The court held: "Even if the assertion of the affirmative defense of the Statute of Limitations, under the circumstances here present, did not give rise to a reasonable expectation that a malpractice claim might be filed, certainly the dismissal of the complaint should have." *Id.* at 637.

The New Hampshire Supreme Court tangled with a much closer call in *Shaheen, Cappiello, Stein & Gordon, P.A. v. Home Insurance Co.*, 719 A.2d 562 (N.H. 1998). A transactional lawyer at Shaheen, Cappiello inadvertently failed to include a provision in a prenuptial agreement that was to provide for the distribution of property to the spouse who contributed the funds to acquire it. The mistake came to light several years later, when divorce proceedings commenced in late 1990 and the client sought ownership of the marital home, which had been purchased with her funds. A litigation lawyer at the firm advised the client in early 1991 of the omitted language, but also discussed with her the possibility of successfully arguing her entitlement to the home even without the omitted language.

In August 1992, the marital master observed at a hearing that he was likely to dispose of the marital home under equitable principles because of the prenuptial agreement's silence on its disposition. At that time, the litigation lawyer informed the client that she would have a potential malpractice claim against the firm if the master ruled as he had suggested. In fact, the master did reach such a ruling in September 1992, and the firm notified its insurance carrier in October 1992 of a potential malpractice claim.

The New Hampshire Supreme Court, on two apparent grounds, ruled in favor of the law firm/insured on the timeliness of its notice to the carrier. First, the court found that only when the litigation lawyer's arguments for the client's entitlement to the marital home failed "did damages emanating from [the transactional lawyer's] oversight become a real issue, for if [the litigation lawyer] had prevailed on [his] argument[s], there would have been no reasonable likelihood of a claim." Second, the court found it important that the client had expressed "no desire to pursue a malpractice claim" when the litigation lawyer had informed her of the error in early 1991. *Id.* at 566.

Although the law firm in *Shaheen* succeeded in its coverage claim against the carrier, the result could have easily turned out differently. Although the court reasoned that damages emanating from the law firm's mistake did not become a real issue until the litigation lawyer's fallback arguments failed, the Third Circuit stated: "When an attorney has a basis to believe he has breached a professional duty, he has a reason to foresee that his conduct might be the basis of a professional liability claim against him." *Coregis Ins. Co.*, 264 F.3d at 307. And while the *Shaheen* court gave weight to the client's failure to express any desire to bring a malpractice suit, other courts have concluded that "the fact that an injured party does not tell the insured that a claim will be made is an insufficient excuse for failing to give timely notice. Indeed, even if the injured party tells the insured that no claim will be made, that does not excuse a notice delay." *Sirignano*, 192 F. Supp. 2d at 205. Courts have held that even relatively short delays may violate the notice requirement. *See*, *e.g., Vianco Prof'l Ass'n v. Home Ins. Co.*, 740 A.2d 1051, 1057 (N.H. 1999) (four-month delay). The lesson is that lawyers must be careful about *any* sort of delay in reporting mistakes to insurance carriers.

Given the obligations implicated by a mistake and the stark consequences of mishandling those obligations, what should you do when you realize you have made a mistake? The first and most critical step is to do your best to meet the ethical obligations discussed above. Sometimes, however, the steps required to meet those obligations are not entirely clear.

A lawyer's ethical obligations to the client following a mistake will depend on the answers to questions such as how clear-cut it is that the lawyer erred, whether the error can be remedied, and how severe might the consequences be for the client. Coming up with reasoned answers to these questions is much more likely through consultation with an objective third party who can give detached advice. Immediately consulting someone else on the issue will also help prevent rash decisions that the lawyer will later regret, such as destroying documents or lying to the client in an attempt to hide the mistake, or, on the other end of the spectrum, blurting out a hasty and perhaps unnecessary confession to the client.

Lawyers should attempt to limit internal communications regarding possible mistakes to verbal discussions.

For a lawyer at a larger law firm, the best place to turn will likely be the firm's ethics committee or general counsel. These individuals are tasked with having a greater familiarity with its state ethical rules, and conversations with them are more likely to be considered privileged than conversations with other lawyers at the firm. Limiting the scope of the communications to the specific issue of complying with ethical obligations to the client will more likely keep consultations privileged. In addition, if the lawyer is compelled to disclose the communications to the client in an ensuing legal malpractice case, communications showing an effort to meet ethical obligations will play much better than communications about how best to position the lawyer against the malpractice claim. Discussions centering on the possible malpractice claim should be directed to the insurance carrier and any counsel it retains in the matter.

For sole practitioners or those at smaller firms where there are no such internal ethics advisers, options may include the state bar's ethics hotline or a lawyer outside the firm that practices in the area of professional responsibility. To the extent the matter is discussed with a lawyer outside the firm, the lawyer should first confirm that the state's ethical rules allow disclosure of confidential client information for the purpose of getting legal advice about the lawyer's compliance with the rules. *See* Model Rules of Prof'l Conduct R. 1.6(b)(2) (2002) (permitting disclosure of confidential client information "to secure legal advice about the lawyer's compliance with these rules"). The lawyer also should make sure the advising lawyer understands that she is representing the lawyer in working through ethical issues and is not representing the client, which will help protect the communications as privileged.

Lawyers should make every attempt to limit internal firm communications regarding possible mistakes, and resulting ethical obligations, to verbal discussions rather than written communications. Although a lawyer will be better positioned to claim the communications as privileged if they are limited to the

firm's ethics committee or general counsel, and to the specific topic of the ethical obligations as opposed to a potential malpractice claim, the law in this area is still murky, and the lawyer is safer keeping things off the written page. For example, the court in *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007), held that "consultation with an in-house ethics adviser is confidential," but then held that the firm had to produce any communications discussing claims the client might have against it or discussing known errors in the firm's representation. *Id.* at *8.

Lawyers should also review their malpractice policies immediately to ensure they comply with any notice provisions in the policy that require reporting the mistake to the carrier. Aside from helping to ensure coverage, notification to the insurance carrier may actually help remedy the situation short of a malpractice claim by the client, or at least limit the exposure of such a claim. Some insurance carriers have resources available to help attorneys properly meet obligations going forward or even to help rectify a mistake by, for example, getting the consequential adverse order set aside. *See* Ronald E. Mallen, et al., *Legal Malpractice: The Law Office Guide to Purchasing Legal Malpractice Insurance* ch. 20 (2005) (listing loss prevention programs offered by various professional liability carriers). Although a lawyer might fear that reporting a borderline incident to the carrier could increase future rates, some carriers specifically exclude the reporting of potential claims from the insured's future risk assessment.

The final words of advice are that lawyers take advantage of a second chance and try to avoid the temptations of either wallowing in self-pity over the mistake or sticking their heads in the sand in hope that the problem will simply go away. Instead, they can take action aimed at serving clients in the best manner possible. Some lawyers may find that the mistake can still be remedied or is not as bad as they initially feared. At the very least, by tackling the problem head-on, they can avoid exacerbating the original mistake by adding ethical violations to it.