# Confessing Sins to Clients

*by Keith A. Call*

One of the most difficult things a lawyer can be required to do is to admit a mistake to a client. It runs afoul of our foundational makeup. We are trained to think, and some of us actually believe, that we are never wrong and never make mistakes.

Lawyers are not the only ones who suffer from an inflated sense of infallibility. Speaking to a group of CEOs and other business leaders, "wrongologist" Kathryn Schultz correctly points out that "most of us do everything we can to avoid thinking about being wrong." She adds, "This attachment to our own rightness keeps us from preventing mistakes when we absolutely need to and causes us to treat each other terribly." Kathryn Schultz, Video: *On Being Wrong*, (Ted.com 2011), *available at* http://www.ted.com/talks/kathryn_schulz_on_being_wrong.html.

Failing to recognize, admit and address lawyer mistakes can easily compound the initial problem, especially from an ethical perspective. (The liability aspects of confessing mistakes may raise different and competing concerns — including important impacts on malpractice insurance coverage — that are beyond the scope of this article.)

At least two ethical rules come into play. Utah Rule of Professional Conduct 1.4 requires the lawyer to keep the client "reasonably informed about the status of the matter" and to "explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Utah R. Prof'l Conduct 1.4. Rule 1.7 states that 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." *Id*. R. 1.7(a)(2). The language of these rules suggests that lawyers may be ethically bound to report material mistakes to clients, especially if the mistake may impact the client's future decisions about the case or if the lawyer might be inclined to alter strategies due to his or her mistake.

Many lawyers have been sanctioned under these rules for attempting to affirmatively cover up or make misrepresentations about prior mistakes. *See* American Bar Association, Center for Prof'l Responsibility, *Annotated Model Rules of Prof'l Conduct* pp. 52–53 (5th ed. 2003) (citing several cases). In some cases, the lawyers even used their own funds to try to "undo" damage to the client, but were still sanctioned for failing to tell their clients the truth about what happened. *See id*.

But when is the mistake so serious that it must be disclosed to the client? There are no known Utah opinions that address this specific issue. The Ethics Committee of the Colorado Bar Association has addressed this issue directly, concluding that the duty to disclose arises whenever a disinterested lawyer would conclude the mistake "will likely result in prejudice to a client's right or claim." Ethics Committee of the Colorado Bar Ass'n, Formal Op. 113 (2005).

While stating the rule is easy, figuring out when it applies is difficult, especially given the lawyer's personal interests at stake and the normal penchant for insisting on his or her own "rightness." The Colorado opinion gives a few examples. It states that failing to file a claim within a statutory limitations period is one example of a mistake the must be disclosed. On the other end of the spectrum, "missing a non-jurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may constitute grounds for loss of sleep, but not an ethical duty to disclose to the client." *Id*. The opinion also concludes that lawyers should be given the opportunity to remedy any error before disclosing it to the client. *Id*.

There are many shades along the "prejudice" spectrum. Whether a lawyer must confess his mistakes to his client must often be considered on a case-by-case basis. This can be a gut-wrenchingly difficult process. Because of the personal interests involved, any lawyer who finds himself or herself in this type of situation would be wise to seek the advice of a trusted mentor or colleague.

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