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So, Um, Mistakes Were Made

In delivering bad news to clients, ask: What would Winston Churchill do?

By Arthur D. Burger

Ethics

Nobody likes to give bad news, and most of us are leery of "shoot the messenger" syndrome. Yet giving bad news is an occasional part of the job for most lawyers in private practice, particularly litigators. Under Ethics Rule 1.4, lawyers must keep clients "reasonably informed about the status of a matter."

On June 18, 1940, in his "finest hour" speech, Winston Churchill gave what was probably the greatest example ever of conveying very bad news in an effective way. On that date, he addressed the House of Commons and—through the BBC—the free world, following the defeat of the French army by the Germans.

He did not mince words and did not waste time getting the worst out first. In his very first sentence, he acknowledged the "colossal military disaster." He flatly reported that "the Battle of France is over." Nor did he shrink from describing what was coming next: "The whole fury and might of the enemy must very soon be thrust upon us."

Finally, he did not overpromise as to the outcome, stating only that there were "good and reasonable hopes of final victory."

Having given the bad news without flinching, he was able to finish with the stirring and memorable call to "brace ourselves to our duties, and so bear ourselves that, if the British Empire and its Commonwealth last for a thousand years, men will still say, 'This was their finest hour.' "

How You Say It

Fortunately, any bad news a lawyer encounters in handling client matters will not be of the magnitude faced by the British in 1940, and Churchill's level of eloquence won't be needed. And yet Churchill's example provides some tips about the psychology of communication.

We tend to accept bad news when it is frankly delivered, and we are skeptical of efforts to soften or sugarcoat the facts. Most of us have a sharp ear for false assurances, and we sense that the speaker is worried, which makes us worry. Teenager to parent: "I just kinda brushed the car against another car. There was hardly any damage, and it really wasn't that big a deal."

But delivering the bad news forthrightly is only half of the task. The other is the "finest hour" part. Clients reasonably expect their lawyers to have a plan or a set of alternate plans for revising their strategy to deal with the new situation. Or at least to report that they are working on a plan and will report back further.

A recent disciplinary case illustrates the hazards associated with covering up bad news, which sometimes can result from pure panic. In *In re Jill Johnson.,* 921 A.2d 135 (D.C. 2007), an attorney represented a husband and wife in a personal injury case involving a car accident. The attorney filed a timely complaint with the court, but unbeknownst to her, the court clerk mistakenly put the complaint with a different case file, and so the complaint was never properly docketed. The attorney did not realize that the court clerk had made this error until she received a letter from the insurance claims adjuster, stating that the docket number that had been referenced did not match and asking when the complaint had been filed. She then checked with the clerk and learned of the error, and then, further, noticed from her bank records that the clerk's office had never negotiated her check with the filing fee. By that time, the statute of limitations had purportedly run.

Rather than advising her clients of the situation and seeking a court order permitting the case to proceed due to the error of the court clerk, she dismissed the suit herself and instead told the clients that the case had settled for $10,000, which she believed was a reasonable amount. She then paid the clients their share of the settlement sum from her own money in an effort to satisfy the clients and hide the mishap.

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Notwithstanding the fact that when the clients ultimately learned the facts they said they were still satisfied with the lawyer, the D.C. Court of Appeals suspended her for two years for her dishonest conduct in concocting a phony settlement.

The attorney here seems to have panicked at the idea that the case seemingly became time-barred. Had she forthrightly told the clients of the predicament when she first learned of it and then vigorously litigated the right to proceed with the case, she might well have been successful. She also could have put her malpractice insurer on notice as well, so that there would have been insurance available if she were not successful. Instead, something that may have been merely an annoyance led to far worse consequences.

Clearly, conveying bad news is easier for a lawyer when the event is not tied to a negligent act of that lawyer. When a lawyer cannot be blamed for the bad news, he should feel entirely comfortable in reporting the setback: "OK, we lost the first round—now here's what we're going to do."

When It's Your Fault

Admittedly, that discussion is tougher when the event does require telling about the lawyer's own mistake. This also raises the dicey and stomach-churning question of whether the lawyer should advise the client of his potential right to file a malpractice claim.

In those more difficult situations, it is even more important that the lawyer avoid the temptation to sweep the bad news under the rug. In *In re Wiliam Reeback and Charles C. Parsons,* 513 A.2d 226 (D.C. 1986), the court suspended two attorneys for six months when they sought to keep their client from learning of an embarrassing but relatively harmless error on their part. The lawyers, who both had unblemished records, were hired to file a divorce action. After they filed the suit, the court sent a warning notice to them that the case would soon be dismissed without prejudice because no answer had been filed by the defendant and the case was not yet brought to issue.

Due to an error in their firm's procedures, this notice did not come to their attention and the case was dismissed without prejudice, thereby requiring the case to be refiled. The lawyers learned of the dismissal shortly thereafter, when the client's brother called the lawyers to inquire as to the status of the case, causing them to check with the court.

Embarrassed by their error in allowing the initial suit to lapse, they sought to cure the error, without telling the client, by filing a new and identical complaint, but this time with a forged and falsely notarized signature of the client. The attorneys then assigned the matter to an associate to complete. When the associate had difficulty obtaining the required proofs of publication of notice to the client's husband (who could not be located), the case was again dismissed without prejudice, but the attorneys were able to have the second suit reinstated two weeks later.

Five months later, the client learned that the first complaint was dismissed and that the second one was filed with a forged signature. The client asked the lawyers to withdraw from the case, which they promptly did, and they returned all of the fees she had paid them.

In the disciplinary case against the lawyers, the court made clear that the more serious wrongdoing was not the initial error in allowing the case to be dismissed, but their dishonesty in filing the second complaint. The court stated:

"[A] first instance of neglect, of itself, normally warrants only a reprimand or censure. What looms largest here, therefore, is the fact that respondents' dishonesty prejudiced the administration of justice itself, even though their dishonesty, as such, caused the client little, if any, prejudice."

In such situations, lawyers may be tempted to keep the problem secret in the hope that the case will turn out well. But hiding the trouble sets the stage for turning a small problem into a big problem. If, upon learning of a mistake, the client reacts by firing the lawyer, so be it. That is the client's right. How the lawyer handles questions about potential malpractice issues will depend on the circumstances, but generally the best response is to suggest that the client consult with independent counsel, because the lawyer has an obvious conflict of interest in assessing the merits of a malpractice suit against himself.

Handling bad news, particularly when it implicates a mistake by the lawyer, sometimes requires a gut check. When in doubt about how to handle such a situation, ask yourself: What would Winston Churchill do?

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