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Feature Articles

What We've Got Here Is a Failure of Communications

By Kathryn S. Whitlock

Every client is your most important client and every case is your most important case. This phrase should be every lawyer's mantra to help remind them to keep in touch with their clients.

ABA Professional Rules of Conduct 1.4 provides that

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent…is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Most states have adopted this rule, or something very similar to it. *E.g.,* Calif. R. Prof. Conduct 3-500; Ga. R. Prof Resp. 1.4; N.Y. R. Prof. Conduct 1.4. It requires lawyers to communicate promptly, clearly, and completely to clients. Failing to do so can lead to disciplinary proceedings and civil suits for liability. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 629, 658 S.E.2d 178, 183 (2008); *DePape v. Trinity Health Sys.*, 242 F. Supp. 2d 585 (N. D. Ia. 2003) (Missouri law).

While the professional discipline level is relatively low (for example in Georgia the maximum penalty for failing to communicate is a public reprimand), public reprimand is, as the name suggests, public and permanent. In addition, the consequences in civil suits can be catastrophic. They can lead to damages for breach of fiduciary duty, under which the client can recover for pain and suffering and emotional distress (*DePape, supra*) or attorneys' fees and punitive damages (*Brito, supra*). Furthermore, "he never called me back" is something that resonates with jurors. No one wants to feel abandoned or unimportant, especially when (s)he is navigating the unfamiliar waters of legal matters.

So lawyers should call their clients. Call them often. Return their phone calls promptly. If the lawyer genuinely is tied up, (s)he should have an assistant call the client and communicate that the attorney is unavoidably unavailable until whatever time, but that the lawyer will reach out then. Then do reach out. Call the client back.

And write to the client. There is a saying in the legal malpractice world: Jurors try the person. Then they try the file. Then they try the facts. In other words, jurors are first going to decide if they like the lawyer. One of the things that makes jurors like lawyers is regular, ongoing communication with the client. One of the things that makes them not like lawyers is irregular, spotty, or no communication with the client. The second thing the jurors are going to look at is the file. They want to see that, in addition to phone calls and in-person meetings, the attorney wrote the client. They want to see formal letters, they want email, and they want entries on billing records. If there is none, especially in our electronic world, the jurors will assume that the lawyer really did not communicate regularly or often with the client, notwithstanding testimony to the contrary. *See, DePape, supra.* A word of caution: despite its ubiquitousness, it is recommended that lawyers not text message, WhatsApp, etc., with clients. These communication forms are too informal for the attorney–client relationship. It permits the lawyer to forget his/her role and become careless about language, which can be a problem in a later dispute. Keep the communication frequent, but at least somewhat formal.

In addition to ensuring that compliance with the Bar rules, and in addition to creating the defense that can be presented in a legal malpractice case, communicating frequently and clearly with clients helps avoid legal malpractice cases in the first place. A good rule of thumb is to touch every file and touch every client at least once every 30 days. As with any profession, "bed side manner" is important. If the client feels like the attorney has done his/her best and stood by his/her side, the client is less apt to be angry and less apt to lash out at the lawyer. Moreover, if the lawyer has communicated frequently and clearly, then there are fewer surprises and the client has been an active

participant in the process and the decision-making. All of those reduce the odds of the client suing the lawyer later when there is an unhappy result.

Besides communicating with clients, lawyers need to communicate clearly and often with their staff, which includes the other lawyers. The ABA Model Rules provide that the supervisory lawyer shall be responsible for his/her subordinate's violation of the Rules. Rule 5.1. Obviously, the lawyer cannot help avoid another's violation of the Rules if the lawyer doesn't know what the other person is doing. And, negligent supervision is a viable count in a legal malpractice case. *United Wis. Life Ins. Co. v. Kreiner & Peters Co., L.P.A.*, 306 F. Supp. 2d 743 (D.C. Ohio 2004); *OneWest Bank, FSB v. Joam LLC*, 2011 U.S. Dist. LEXIS 150999, 2011 WL 6967635 (E.D. N.Y. 2011); *Fang v. Bock*, 2000 ML 1730 (2000). Lawyers should make sure they communicate clearly and frequently with the team so that the supervisor's instructions are clear, the vision for the matter is plain, and the lawyers' potential liability is diminished.

Another reason to keep in close touch with staff is to ensure that the docket is properly calendared and monitored. All the best intentions of the secretary noting the statute of limitations is for naught if the lawyer doesn't realize the statute expires today. Make sure the system selected has redundancies and backups. One person should be responsible for entering deadlines and another for double-checking them. There needs to be in place a clear system for regular exchanges of information, such as the hand-off of a hard-paper copy of deadlines every Friday; or a response-required entry on an electronic calendar. Deadlines are too easy to miss if they are not properly calendared and a missed one is so very hard to defend against. Regardless of overall skill and acumen, failing to file within the statute of limitations, or failing to answer within the time provided by law, or not responding to an offer while it was viable, is generally *per se* negligence. *Labair v. Carey*, 2012 MT 312 (2012); *Bagan v. Hays*, 2010 Tex. App. LEXIS 6530, 2010 WL 3190525 (2010).

Calendaring systems need to have docketing and tickler functions. The lawyer needs to be reminded several days ahead of when a task needs to be completed to ensure that adequate time is allocated for completing the task. And the docketing or calendaring system needs to work with the particular lawyer's style and the law firm's practice. There are many products out there that can help. For example, LawBase is a web based database that stores cases. It integrates with Calendar Rules for deadlines. Calendar Rules is subscription based, based upon number and types of courts in the subscription. Another system is SmokeBall . It is an all-in-one application which tracks time and deadlines and stores emails. MyCase is a web based management software that also does calendaring and notes deadlines, tracks billing and stores documents in one place. PracticePanther also has everything in one place for lawyers. It consolidates legal calendars and emails into one software.

Whatever system that is selected, it is important to share the deadlines and due dates with the client as part of the regular communications with the client. This helps clients prepare—psychologically and actually—for whatever comes next in the legal matter. It makes the client a part of the process, which reduces the chances of the lawyer taking action that is at odds with the client's wishes and reduces the chances of an outcome that displeases the client. And, if the client is happier, the lawyer's life is easier.

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Ugh Oh: Doctrine of *In Pari Delicto* Severely Restricted in Massachusetts

By Seth L. Laver and Andrew P. Carroll

In the right circumstances, *in pari delicto* can act as a safety net in fraud claims. Latin for "in equal fault," the doctrine can be applied to impute intentional conduct and excuse alleged professional negligence. However, in a recent ruling from Massachusetts's highest court, the *in pari delicto* defense was significantly narrowed and the foundation laid for a challenge to the doctrine. Unlike many of the surrounding states, Massachusetts' Supreme Judicial Court emphasized that *in pari delicto* is focused solely on fault allocation, which is distinguishable from the principle of risk allocation in respondeat superior. Based on this distinction, the court held that only senior management's conduct can be imputed to a corporation and, accordingly, *in pari delicto* will be unavailable if the misconduct was that of a lower ranking employee.

The case originated at a Massachusetts college, where the Director of Financial Aid was swapping out scholarships and grants for federal student loans. Students eventually began receiving repayment notices and after several complaints, the school investigated and uncovered the scheme. The Director pled guilty to several federal charges in connection with the scheme and the school brought suit against its outside auditor to recover the amounts paid to void the fraudulent student loans.

The auditor moved for summary judgment seeking to impute the Director's bad conduct to the college under *in pari delicto* and bar the school from recovery. The trial court granted the motion, finding that the Director's conduct is imputed to the college under a traditional respondeat superior test, and that the fraud was "far more serious" than the negligence of the auditor under the *in pari delicto* analysis. The case eventually reached the Supreme Judicial court, which reversed the trial court's opinion and issued a blanket holding that only the actions of senior management can be imputed to a corporate party under *in pari delicto*.

The court's ruling took special care to distinguish itself from jurisdictions such as New York, where agency law and its underlying principles are heavily considered in ruling on an *in pari delicto* defense. It noted that the purpose of traditional imputation is to allocate risks between principals and innocent third parties, while *in pari delicto* is "focused squarely on the moral blame of the parties." The court then contrasted this defense with comparative negligence, through which the auditor could still seek some liability shifting for negligent hiring, retention or supervision.

In sum, the court found that it would not be equitable to lay "blame" with a corporation for malfeasant employees in the same way it could with the most senior of management.

The Massachusetts Supreme Judicial Court's decision is significant for a few reasons. First, the court essentially untethered *in pari delicto* from agency law altogether, as it found there are foundational distinctions between the two defenses. In doing so, the court narrowed its availability by limiting it to cases wherein senior management, which apparently excludes the director of a department from the definition, is the bad actor. In other words, a court need not look to agency law in analyzing the imputation of agent actions, instead focusing only on the seniority level of the malfeasant actor. However, it should not be lost that the court questioned whether a Massachusetts law regarding damages allocation in accounting fraud cases has rendered *in pari delicto* completely unavailable. While the court spent little time on the issue, it is clear that the argument is now teed up for eventual presentation to the appellate courts and it could only be a matter of time before the survival of *in pari delicto* becomes a serious question in Massachusetts.

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Cyber Phishing for Wire Fraud: How to Best Resolve It Once It Happens

By Rinat B. Klier Erlich

There are many forms of cyber fraud including, stolen information, cyber ransom and identity theft. In those situations, a perpetrator attacks a business and is able to steel from the business information of third parties, financial documents, or even shut down the business data in exchange for payment of a ransom. Those forms of cyber-attack are against the business with intent of gathering general information that can be used later. However, since businesses are aware of possible vulnerability to cyber-attacks, many companies regularly update their systems against viruses and malware, they use encrypted data storage, and they install firewalls.

Yet, as defenses to cyber fraud are developed, the perpetrators become more sophisticated as well. A new form of cyber fraud has emerged, and this form of cyber fraud is based on targeting a specific group of professionals, it involves spying on their activities, and it results in wire fraud. By default, this necessitates more creative ways in which to resolve these multi-party, complex claims matters as discussed below.

Cyber thefts around the globe grew last year to an alarming $1.2 billion, compared to $100 million in more traditional theft from financial institutions. In light of those developments world-wide, in the last few months, Southern California saw an increase of focused attacks on real estate transactions resulting in wire fraud. Real estate transactions involve several parties, all eager to close the transaction (causing the parties to pay less attention to detail), and there are large amounts of cash that exchanges hands. Waiting years for the court system to resolve the issues is just not feasible.

In a typical scenario, a perpetrator locates emails of real estate agents and brokers working in a specific area. An inexpensive software can be used to run such a search and identify the agents and brokers. Then the perpetrator engages in phishing by sending emails to the agents and brokers with purported attached documents. A perpetrator can, for example, send a document through DocuSign or GoogleDocs and the email invites the recipient to log in from the email into what appears on the receiver's email to be the sign in page for the software (DocuSign or GoogleDocs). The perpetrator then records the password and uses it to start monitoring the real estate agent or broker's email.

Once the perpetrator learns of an existing escrow transaction the perpetrator can then pose as a party to the transaction. For example, the perpetrator can send an email from the real estate agent or broker's actual email account with wiring instructions to the buyer. The perpetrator is able to accomplish an email exchange with the buyer (unknown to the agent or broker) by changing the action in the real estate agent or broker's inbox, so that the inbox will not show incoming e mails and the agent or broker would not suspect that another person is communicating from their e mail account. The perpetrator can also send an email to the escrow company imposing as the seller and instruct escrow where and how to send the sale proceeds by providing a new routing number for a wire. To add credibility, the perpetrator copies other parties in the transaction like title, but uses for them a false email that appears similar to the original.

These new forms of scams are very sophisticated because they are not like an anonymous perpetrator penetrating the business firewalls. In those newer forms of scams the perpetrator actually monitors an email account and learns valuable information about the account holder's business. This is like a house burglar monitoring when the occupants leave the house and when they go to sleep. These scam are also fast! The sooner discovered, the sooner it is necessary for one's own protection as well recovery of funds, to mediate the matter, concomitantly obtaining a restraining order regarding the exporting of funds.

There are several ways to avoid phishing that results in wire fraud. Internet users are encouraged to use two methods of verifications (when they log into their e mail it sends a verification to the person's phone). They are also encouraged to update their software when updates are available, and not continue to use older software versions. Parties should always include a phone conversation when a transaction involves money transfer, and everyone should always read their e mails carefully.

Yet most importantly, when a problem occurs, all parties must assist each other to immediately address it and prevent the spread of the information. Unfortunately, parties

have been reluctant to call the FBI Cyber Crimes division due to concern with IRS and other regulatory bodies. The FBI informs, that if it learns of wire fraud within the first 72 hours, it has the best chances of recovering the funds. Moreover, if this occurs in the middle of a transaction, the parties should work together to remediate the loss. We noted that when the parties work together, often sellers are willing to adjust the price, brokers are willing to waive part or all of their commissions, lenders are willing to extend loan terms, and the brokers' errors & omissions carriers are willing to bridge a gap that otherwise they would not offer until a case is fully litigated. In those instances where all parties work together expediently, the parties are able to close a transaction that would have otherwise been lost to wire fraud, and everyone avoids further liability and damages. The parties should all work together to identify the source of the fraud, immediately put the relevant carriers on notice, and contact the financial institution that received the fraudulent wire. Contacting the recipient financial institution can put a hold on the wire before it is released to the perpetrator's hands.

Society's fast pacing approach to handling transactions and money has to be met with an equally fast pacing resolution. If parties start pointing fingers at each other and wait until the dust settles, the losses can only grow and the damages will be much higher. A buyer will lose an interest rate lock and the property the buyer wanted to purchase; the seller will lose time on the market; and the professionals in the transactions (brokers, escrow) and consequently their carriers--will have higher exposure to liability. Last but not least, remember to consider the stage of the matter. Is notice required to people whose information was compromised? What will the damages be? There is a lot at stake and you should take action and move quickly to mitigate the damages.

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