"Ethics Song '89": Conversations About More Than the Weather

Lawyers must inform clients about things that materially affect their cases, need not disclose minor mistakes, and can engage in small talk but should avoid oversharing.

BY STACIE H. ROSENZWEIG

Right before I sat down to write this column, I managed to earworm myself with "Pop Song '89"[1] from what was then considered "college rock band" R.E.M.[2] Depending on who you ask, the song may be a too-on-the-nail parody of bubblegum pop, a portrait of an anxiety-ridden attempt at making insipid small talk, or both. Because I can't shut off my ethics brain, ever, for any reason (earworm or not), I think the song is both but also is a good jumping-off point for a discussion of those difficult conversations you don't want to have with your clients. (I am a lot of fun at parties, I swear.)

Most of us would rather talk about the weather, or the government, or any one of 10,000 other topics than tell clients things they don't want to hear. Most of us would rather be at a party we weren't invited to and we had to make small talk with that person who thinks they know us but we definitely don't know them.

But, most lawyers need to have these conversations sometimes. SCR 20:1.4 requires lawyers to discuss a wide variety of matters with our clients, generally in a reasonably prompt manner.[3] And this makes sense — clients need to know what's going on and have the information they need to make decisions concerning representation. Sure, it's always more pleasant to tell a client that you won their summary judgment motion than it is to tell them that the court of appeals reversed. Still, it is the rare lawyer who gets to deliver only good news.

Hello, I'm Sorry, I Lost Myself, I Think I Thought You Were Someone Else

Because human beings are basically mistake-making machines in flesh form, sooner or later you're going to have to tell a client you made a mistake. While you don't need to tell clients about every error (the wrongly calendared call with opposing counsel can quietly be rescheduled if there's no harm otherwise), you do need to discuss the ones that could materially affect the case.[4] Clients need to know this information to determine how to proceed (and whether to proceed with you as their lawyer or proceed to a malpractice claim or grievance).

A 2010 article in *Wisconsin Lawyer*, "What to Do After Making a Serious Error,"[5] provides solid guidance. Some Wisconsin Supreme Court rules have been amended since then but not in ways meaningful to this analysis. Human nature remains the same. What has changed is technology — in 2010, smartphones were novel, and smartwatches were still mostly the purview of Maxwell Smart (aka Agent 86) on *Get Smart* and Inspector Gadget. Many lawyers are now reachable 24/7 and that means that 24/7 we might "reply all" instead of "reply" or send an email intended for "Jane Smith" to the auto-populated recipient "Jack Smithers" instead, and now someone has information they shouldn't have.

Do lawyers really need to tell affected clients when they've done things like this? The Wisconsin Supreme Court Rules, even as amended, don't always keep up with technology changes. But the tried-and-true advice still holds — this is a case-by-case determination that depends on such factors as the sensitivity of the information provided and what the client needs to know to make an informed decision about representation. A simple "when can we meet and confer about the outstanding discovery?" query may not trigger any duty, particularly if the client is not identified.[6] A

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misdirected attachment[7] of medical or financial records will require disclosure to the client (and, depending on the specifics, may also trigger reporting duties under state[8] or federal[9] law as well). It certainly is embarrassing to tell a client that someone with a similar name now has access to the client's private information, but it's necessary.

Should We Talk About the Data Breach?

Occasionally, a tech mistake results in a hack of a law firm's file server. Do lawyers need to tell clients when that happens?

The American Bar Association issued a formal opinion a few years back[10] setting forth a lawyer's obligations after a data breach or "cyberattack." ABA opinions are not binding on Wisconsin lawyers, but they provide helpful guidance when the ABA Model Rules are similar or identical to the Wisconsin Supreme Court Rules. In the formal opinion, the ABA concluded that under Model Rule 1.4 (substantially similar to SCR 20:1.4), lawyers are required to communicate with *current* clients under some, but not all, circumstances:

"A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer's ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client's interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach."[11]

In other words, at least insofar as the ethical rules are concerned, lawyers don't need to inform every client about every intrusion but do need to tell specific clients about intrusions that affect their data. The opinion declined to create a requirement to tell *former* clients of such breaches, in absence of a "black letter provision requiring such notice."[12]

Hello, My Friend, Are You Visible Today?

Sometimes, the difficult conversation doesn't arise from anything the lawyer did or failed to do — sometimes, it doesn't even directly relate to representation. Traditional advice to never discuss sex, politics, or religion at work may be impossible in the context of some representations (such as family and criminal law); candid discussion of such topics may create a perception of artificial intimacy.

And lawyers are not immune — we want to empathize with our clients and may end up sharing our own, relatable stories. Discussions of a personal nature between lawyers and clients are not, in themselves, ethically problematic — lawyers (and clients) have lives outside work. But care needs to be taken to ensure that the discussion does not become so intimate that boundaries are violated and the lawyer cannot be objective; conversations like this may create or lead to a material-limitation conflict.[13] Likewise, discussions should still remain professional in tone and content; they should not degenerate into trash-talking or harassment.[14]

If you don't want to have not-work-related conversations (or just prefer to stick to noncontroversial topics), that's fine too — it's a matter of professional and personal judgment, not ethics. Clearly communicate that preference to clients, and let them know it's not personal (and that's the point). Many lawyers, despite our reputation for conflict and confrontation, are people pleasers at heart and it's hard to let down someone who seems to want to be your friend. But doing so can help avoid bigger misunderstandings later.

Conclusion

Difficult conversations, whether initiated by the lawyer or by the client, are part of the job. Lawyers fulfill their ethical obligations by having these needed conversations promptly and candidly and also by knowing when they shouldn't speak up.

Deep breaths. It's not the end of the world as we know it. You'll be fine.[15] **WL**

ENDNOTES

[1]If you are a person of a certain age I have likely managed to earworm you as well, and for that I apologize. If you are not a person of a certain age, give the song a listen to understand the subject headings a little better.

[2]R.E.M., *Pop Song '89*, *on* Green (Warner Bros. Records 1988).

[3]The Wisconsin Supreme Court Rules rather circularly define "reasonable" to denote "the conduct of a reasonably prudent and competent lawyer," SCR 20:1.0(k), and do not define "prompt" at all. We can let circumstances and professional judgment guide exactly how and when we have these discussions.

[4]SCR 20:1.4.

[5]Timothy J. Pierce & Sally E. Anderson, *What to Do After Making a Serious Error*, Wis. Law. (Feb. 2010), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=83&Issue=2&ArticleID=2042.

[6]See Wis. Formal Ethics Op. EF-17-02.

[7]Be sure to notify the recipient as well. If the recipient is a lawyer and the information is privileged, the lawyer is obligated to terminate review and abide by the sender's instructions until a court says otherwise. SCR 20:4.4(c)(3).

[8]Wis. Stat. § 134.98.

[9]Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936.

[10]ABA Formal Op. 483 (Oct. 17, 2018).

[11]*Id.* at 11.

[12]*Id.* at 13.

[13]SCR 20:1.7(a)(2).

[14]SCR 20:8.4(i); "trash talking" about a judge or public legal officer may run afoul of SCR 20:8.2(a).

[15]*See* R.E.M., *It's the End of the World as We Know It (And I Feel Fine)*, *on* Document (I.R.S. Records 1987). **WL**