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ARTICLES

# Bumps in the Road: How to Share Setbacks with Your Client and Why You Must

"Tell the truth faster."

By Kathleen Balthrop Havener

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Uh-oh. The subpoena wasn't quashed—minor stumble; you'll recover. Oh, no! Your opponent's motion for summary judgment was granted—a serious setback. Yikes! You lost the appeal—you're done unless you head for a higher court. AAARRGGHH! Your appeal was dismissed because you failed to conform to the rules—call your insurance carrier.

In any of the above situations, you must notify your client. In my estimation, the worst thing that can happen is that your client hears the news before you have let him or her know. Really. That's the *worst*. Don't let it happen. Just don't.



My sister has a long-standing motto: "Tell the truth faster." My sister is a poet, a writer, a sailor, an artist, a teacher, a coach, a cancer survivor, a wife, a mother, a grandmother, a mother-in-law, a sibling, a friend. Her motto applies in every circumstance of her life. About 15 years ago she taught it to me. A client once met my sister and, upon hearing her say it, quickly piped up, "Kathleen says that! It's so great to know your lawyer stands by that rule." My sister smiled sweetly and kindly refrained from saying, as she could have, "Of course she says that! I taught her that and a lot more that she knows." My sister would have been justified.

Breaking bad news to a client is a delicate art. Especially when it's early in the case or the news is a bad break but not "we're finished," one walks a tightrope explaining what has happened without either dashing the client's hopes or downplaying the severity of the setback. When your client is not general counsel of a company but rather the injured party in a negligence case, your job is that

much harder—you can't rely on the lingua franca of the lawyer's trade. You must explain the event and its impact on your case in a language the client understands. Let me assure you, the Moms and Pops of this world are not likely to have the foggiest idea what a motion *in limine* is or what some twist in the hearsay rule means.

Just picture a situation: You receive the judge's opinion on your opposition to the defendants' motion for summary judgment. You immediately turn to the final page to learn that the motion is partly granted and partly denied. Not a complete victory, but something of your case survives.

How do you break the news to your client in language that allows him or her to understand exactly what the court has ruled and how it impacts the case without pushing the client to despair and without sugarcoating the truth?

## Be a Teacher

My first bit of advice is that you have to start preparing your client from the day you accept the case. Preparing to file the complaint, drafting discovery requests, responding to discovery, reviewing discovery responses (especially document productions), each is an opportunity to educate your client about how the system works and to explain the progress of a claim through the court system.

I learned the lesson the hard way about including my client in every step of the judicial process and the cost of failing to do so. The matter in which I represented him is one that required an expert witness to establish the breach of duty as an element of the claim. The case calendar was not issued until after a status conference on June 8. To my shock, my client's expert export was due on July 6! I knew I could not use the expert I ordinarily would have turned to because of cost and because of the tight deadline. While I spoke briefly with my client and tried to explain, our conversation was rushed, and—admittedly—I failed to convey to him the message that we could not win the case (or even survive dispositive motions) without a strong and well-informed expert. I was under the gun because of the short time limit. My handling of the entire situation could have been significantly better even though, in the long run, I did my job, and I did it well.

I chose an expert witness. I know her. I trust her. I respect her judgment, and I know that we work well and efficiently together. I spent a significant amount of time—and so did the expert—conveying and learning the facts (preparing a written memorandum as part of this task), creating a chronology, and discussing the structure of the report. Because the expert had just changed jobs, she didn't have either her CV or her form retainer letter readily transmissible. It took nearly a week for me to obtain these documents, and her report was all but finalized before I finally brought my

client into the loop. Although in the end my client was more than satisfied by the expert and her expert report, he was *not* happy that I had unilaterally made the decision about whom to engage, and worse, agreed to spend *his* money without including him in all the lead-up to the choice and engagement of the expert witness.

I came mighty close to swallowing a multi-thousand-dollar expert's bill and weeks of my own time for failing to make my client a part of the decision-making process from the start. It took some serious convincing to bring him around to the idea that I had chosen rightly. And the blame was entirely mine. Had I made the client part of the entire process, nothing that happened would have come as news to him. Instead, I had to explain all over again that we needed an expert witness and why; that I had already gone so far down the path toward completing the report that it rendered my unilateral decision essentially written in stone; and my client—because of my sole actions—*already owed* the expert a significant amount of money. It was a difficult and unpleasant conversation. And it could have been avoided if I had just included my client all along the way.

We shouldn't allow ourselves to become so rushed that, even though we *know* the right way to do something, we fail to *always* do that thing the right way. Our hurried lives sometimes cause us to cut the wrong corners. This almost always results in having to spend *more* time down the road.

### Prepare Your Client for Alternative Outcomes

When pursuing or defending a lawsuit, always make sure that the client understands what you are doing and why. Even more important, explain to the client all the possible outcomes of the step you're taking. Some people might not want to go this far, but I go through the various outcomes from the best case to the worst. I try to answer questions clearly and simply. I use analogies. My clients would tell you that I begin these discussions the same way every time and it always makes me smile: "My Alabama-born football-loving daddy always said, 'Three things can result from a forward pass and two of them are bad.' It sometimes feels the same for any move a lawyer makes." Your client needs to be prepared for the result of every decision he or you make(s).

- You don't depose a particular adverse witness? She may never be called. She may testify and hurt your case. She may testify and knock it out of the park in your favor.

- You file a motion to compel? The judge may be distressed because the lawyers can't get along. The other side may just give in and turn over what you're seeking. The judge may grant your motion and force your opponent's hand. Or the judge may deny your motion, and you're right back where you started.

- Your opponent moves for summary judgment and you oppose it? The judge may partly grant and partly deny it. The judge may grant it, and you all go home and/or decide whether to appeal. Or the judge may deny the motion. While the motion is pending, you have to conduct the case as if you're aimed full-speed-ahead at trial. (And if an entirely unpredictable outcome arises, your war-story list just gets a bit longer. The last time I went to a rural Ohio county to argue that a defendant's motion for summary judgment should not be granted, the judge instructed me to file a plaintiff's motion for summary judgment. I took it as a good sign. It wasn't.)

### It's Part of Your Job

Unexpected and unfortunate outcomes happen in our profession. They come with the job. None of us is always on the winning side. Things don't always work out exactly as we hope they will. From an unsatisfactory evidentiary ruling in a negligence case to losing a landmark case in the U.S. Supreme Court, we all face setbacks. We all have to tell our clients that, despite our best efforts, things didn't come out our way. Dissembling, minimizing, and second-guessing are as ineffective as they are distasteful. You have to take it on the chin. Your client can take it, too. Sit down. Take your time. Breathe deeply. And tell the bald truth, as clearly and as soon as you possibly can. The time for dissecting, rehashing, and second-guessing comes later. As soon as you know that things have taken a bad turn, your client should know it, too. Don't sugarcoat it and don't turn it into a catastrophe if it isn't one. It just is what it is, whether or not it's just. Tell the truth faster.

### The Rules of Our Profession Require It

If you're wondering whether I'm talking through my hat, be aware that the ABA's Standing Committee on Ethics and Professional Responsibility has issued two formal opinions this year that directly address a lawyer's duty to disclose unpleasant truths to a client. On April 17, 2018, the standing committee issued Formal Opinion 18-481, based on Model Rule 1.4, mandating that a lawyer inform a current client if the lawyer believes he or she has "materially erred" in that client's representation.

> An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

The new requirement flows naturally from Rule 1.4's proviso that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Moreover, the information about a material error must be provided to the client promptly. In other words, tell the truth faster.

On October 17, 2018, the standing committee issued Formal Opinion 18-483, which imposes a duty on lawyers to notify clients when they or their law firms have experienced a data breach that involves, or has a substantial likelihood of involving, material client information. Under any circumstances, as the latter opinion makes clear, lawyers simply are not permitted to hide negative information from their clients.

### Now What?

After you tell the truth faster, what next? The time for discussing next steps and "where do we go from here?" is *not* immediate. Among other things, if it's anything less than the end of the case, you may very well figure out how to use what feels like a disaster to your own advantage. The decision to seek reconsideration or to appeal shouldn't be immediate either. Motions for reconsideration and appeals cost money, and judgments are commonly upheld. Your client should never throw good money after bad. Figuring out where to go after the setback has occurred is something to put off until everyone has had 24 hours to think about it and sleep on it, if possible. More important, do you want to risk that your client discovers the original bad ruling when he or she sees your time spent preparing a motion for reconsideration on her bill?

When there is bad news that your client should know, sooner is *always* better than later. Your clients will learn some things about you that are important: You're not afraid; you won't mislead them; your reputation for honesty and forthright communication is more important to you than your win/loss column. And you will learn something about bad news, about yourself, and about your client, too: Once the task is accomplished, it's over. The power that bad news has over you is diminished once you've shared it. You don't have to spend another moment dreading delivering news that's already disclosed. And your relationship with your client will be different forever after. You will have come through combat together, and survived.

Two things I hope you will have learned by the time you reach this sentence: First, telling the truth sooner is always the best course. And second, my sister is always right.

This article is updated from "How to Deliver Bad News to Your Client," previously published in the January/February 2016 edition of *GP|Solo*, the bimonthly publication of the Solo, Small Firm and General Practice Division of the American Bar Association.

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