My Bad: Creating a Culture of Owning Up to Lawyer Missteps and Resisting the Temptation to Bury Professional Error

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I. Introduction

Attorneys are human beings who make mistakes; it is part of the profession. In some cases, it is what an attorney does after a mistake that defines him or her, ethically.

*Idaho State Bar v. Clark*, 283 P.3d 96, 104 (Idaho 2012). *See also*, David D. Dodge, *Front Eye On Ethics, Owning Up To Your Own Mistakes*, Arizona Attorney, 46-MAY Ariz. Att'y 10 (May 2010)(“Of all the things we dread having to tell clients from time to time, Surely news of our own negligent acts during representation has to be one of them. If our continuing duties as a lawyer may be impaired because of our mistakes, our ethics rules require that the client be told . . . Few authorities are directly on point, but trouble can be incurred by the lawyer when he tries to hide his errors from a client who should be advised of the consequences and of the options available, including the hiring of a new lawyer.”) The rules of professional ethics and common law fiduciary obligations of a lawyer have been found to require lawyers to admit their mistakes under certain circumstances. Lawyers generally face the possibility of grave negative consequences if they fail to admit their mistakes when required. The consequences of concealing such mistakes are even more serious.

This paper surveys the case law addressing the consequences of admitting error on the one hand, and failing to admit mistakes and/or attempting to conceal them on the other. We begin with an introduction of the sources from which a duty to admit mistakes may arise. We then explore cases judging attorney error from three perspectives: the courts; disciplinary tribunals; and professional liability insurers. Specifically, we address how admitting error may play out in the legal proceeding in which the mistake is made, in a malpractice action or disciplinary proceedings stemming from the error, and in dealings with the lawyer’s professional liability insurer.

II. Sources of The Duty To Admit Lawyer Error

There are at least one four sources from which a duty to admit lawyer error may arise:


The Restatement (Third) of the Law Governing Lawyers §20 (2000) provides that:

(1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer . . .

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We address only the commonly cited authority for the duty to disclose mistakes. Others have been noted. For example, Model Rule of Professional Responsibility Rule 2.1, which states that “in representing a client, a lawyer shall exercise independent professional judgment and render candid advice”, has been cited by some commentators as a possible basis for reporting errors. *See* Mark Hansen, *When The Case Lays an Egg: In the event of an error, it may pay to let the client -- and the insurer -- in on it*, ABA Journal (March 2000). Also, where a failure to admit mistakes is combined with active concealment of the mistake, other ethical rules of conduct may be implicated. *See, e.g.*, *Attorney Grievance Com'n of Maryland v. Pennington*, 387 Md. 565, 876 A. 2d 642, 651-652 (Md. 2005)(indicating that Rule 8.4, which prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, imposes a duty to refrain from hiding mistakes).
A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment C to the Restatement provides:

A lawyer must keep a client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, problems, and costs of the representation [Cite.] The duty includes both informing the client of important developments in a timely fashion, as well as providing a summary of information to the client at reasonable intervals so the client may be apprised of progress in the matter.

Important events might affect the objectives of the client, such as the assertion or dismissal of claims against or by the client, or they might significantly affect the client-lawyer relationship, for example issues concerning the scope of the representation, the lawyer's change of address, the dissolution of the lawyer's firm, the lawyer's serious illness, or a conflict of interest. If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client. For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw . . .

(Emphasis added).

The Restatement and accompanying comments have been relied upon by courts and other authorities as a source from which a duty to inform clients about mistakes arises. Encyclopaedia Britannica, Inc. v. Dickstein Shapiro, LLP, Civil Action No. 10–0454 2012 WL 8466139, *20 (D.D.C. February 2, 2012)(citing the provision for the proposition that “[u]nder some circumstances, a lawyer may, indeed, have an obligation to advise his client about a possible malpractice claim. Most obviously, when a lawyer continues to represent a client who may have a viable malpractice case against the lawyer, the client may unknowingly be relying on legal advice from a conflicted source”); Waggoner v. Caruso, No. 602192-2007, 2008 WL 4274491, at *7 (N.Y. Sup. Ct. Sept. 10, 2008) (“Attorneys do have an obligation to disclose their own acts of malpractice to their clients” (citing the Restatement)); Leonard v. Dorsey & Whitney L.L.P., 553 F.3d 609, 629 (8th Cir. (Minn.) 2009)(citing the Restatement as providing “[a] classic example of a duty to advise a client of potential malpractice is a lawyer who fails to file a lawsuit for a client within the limitations period”); Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, Baylor Law Review (Winter 2009)(citing the Restatement); Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, Wisconsin Lawyer, 83–FEB Wis. Law. 6, 9 (February 2010)(“The Restatement (Third) of the Law Governing Lawyers, §20, comment c., takes the position that a lawyer has an obligation to inform the client if the lawyer's conduct gives the client a 'substantial malpractice claim' against the lawyer”).
The Restatement has been criticized as inadequate because “it does not require reporting until far too late”, i.e., when there is a “substantial malpractice claim.” Benjamin P. Cooper, *The Lawyer’s Duty To Inform His Client Of His Own Malpractice*, 61 BLRLR 174, 193, Baylor Law Review (Winter 2009). It has been suggested that the duty to admit a mistake to the client “must arise much earlier and certainly by the time that the error may lead to a substantial malpractice claim against the attorney, which in most cases will be when the mistake was made. [Cit.] It is at that time that the client needs information to determine how to proceed with the current representation and with any potential malpractice claim.” *Id.* at 194.


The American Bar Association’s Model Rules of Professional Conduct are another source from which a duty to admit error has been found to arise. Specifically, Rule 1.4 of the Model Rules 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, as defined in Rule 1.0(e), is required by these Rules;

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

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

Comment 1 to Rule 1.4 states that “[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.” Comment 5 explains that in communicating with the client, “[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.” Comment 7 states that “[a] lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.”

Rule 1.4 and its comments have been relied upon by courts and other authorities as a source from which a duty to inform clients about mistakes arises. *See Attorney Grievance Com'n of Maryland v. Pennington*, 387 Md. 565, 876 A.2d 642, 650 (Md. 2005)(in finding that a lawyer violated Rule 1.4 for failing to disclose a mistake - and concealing it - the court held that the “[t]he proper course of action would have been for the [lawyer] to disclose to the [clients] the status of their case and advise them to seek independent counsel”); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995) (finding that under New Jersey Rules 1.4 “an attorney who realizes he or she has made a mistake must immediately notify the client of the mistake as well as the client's right to obtain new counsel and sue the attorney for negligence”), *abrogated on other grounds by Olds v. Donnelly*, 696 A.2d 663 (N.J. 1997); *People v. Greene*, 276 P.3d 94, 99 (Colo. 2011)(citing
with approval a prior ethics opinion concluding that “[w]hen, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client”); Colorado Bar Association Ethics Committee Formal Ethics Opinion 113 (November 19, 2005)(finding that the Rule 1.4 mandate “includes the ethical duty to inform the client of material adverse developments, including those resulting from the lawyer’s own errors”); New Jersey Supreme Court Advisory Committee On Professional Ethics Opinion, Opinion 684 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (N.J.Adv.Comm.Prof.Eth. March 9, 1998)(“Clearly RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted”); Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, Baylor Law Review (Winter 2009)(“Under the proper circumstances, Rule 1.4 requiring candor in lawyer-client communications . . . require[s] lawyers to self-report”); Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 20 (Winter 2008)(“We have an ethical obligation to keep our clients ‘reasonably informed about the status of the matter’ we are working on for them. Model Rules of Prof’l Conduct R. 1.4(a)(3) (2002). To meet this obligation, lawyers must disclose information material to the representation, which can certainly include the consequences of a mistake made by the lawyer”); Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, Wisconsin Lawyer, 83-FEB Wis. Law. 6, 7-8 (February 2010)(“Rule 1.4 has been consistently interpreted by courts . . . as requiring lawyers to inform clients whenever the lawyer makes a serious error in the course of the representation”).

In *Attorney Grievance Com’n of Maryland v. Pennington*, 387 Md. 565, 876 A.2d 642 (Md. 2005), an attorney error combined with the lawyer’s failure to keep adequate records to detect the error led the client’s lawsuit vulnerable to dismissal after the statute of limitations passed. The lawyer voluntarily agreed to a dismissal without consulting with her clients about the errors, the statute of limitations running, or the dismissal agreement. *Id.* at 646. The lawyer did not tell her clients that the case had been dismissed, but instead induced the clients to agree to accept $10,000 for their injury claim, paid from the lawyer’s personal funds. *Id.* The lawyer presented the clients with a document entitled “Statement of Settlement”, purporting to be a settlement of the personal injury claims. *Id.* at 647. The lawyer also tried to negotiate reductions of the client’s medical expenses with her medical providers, arguing that reductions were appropriate because under the terms of the clients’ “settlement,” the client stood to receive little compensation if expenses were not reduced. *Id.*

In a later bar grievance proceeding, the lawyer admitted that she did not inform the clients about what had happened with the case, admitted that she presented them with the fictitious “Settlement Statement”, and admitted that she paid the settlement from personal funds. *Id.* at 648. The lawyer was found to have violated several rules of ethics, including Rule 1.4. Facing disbarment, the lawyer argued that “her failure to disclose the [initial] error or the dismissal of the case was warranted because she feared that [the client], a client with whom she had developed a friendship, would feel some remorse or discomfort in taking money from [the lawyer]” and that “her decision not to disclose was reasonable.” *Id.* at 658. The Court disagreed, stressing the comment to Rule 1.4, which mandates that “[a] lawyer may not withhold information to serve the lawyer’s own interest or convenience....” *Id.* The Court concluded that the lawyer’s failure to disclose the dismissal to the client “deprived them of the information necessary to determine if they wished to pursue a malpractice claim against her” in violation of Rule 1.4. *Id.* The lawyer was disbarred. *Id.* at 660.
C. ABA Model Rules Of Professional Conduct Rule 1.7 (2013)

Model Rule 1.7 provides an additional source from which some courts find a duty to admit error. See Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995) (finding Rule 1.7 a source of a lawyer’s “ethical obligation to advise a client that he or she might have a claim against that attorney, even if such advice flies in the face of that attorney’s own interests”), abrogated on other grounds by Olds v. Donnelly, 696 A.2d 663 (N.J. 1997)(citing Rule 1.7 for the proposition that “[t]he Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal-malpractice claim even if notification is against the attorney’s own interest”); Attorney Grievance Com’n of Maryland v. Pennington, 387 Md. 565, 876 A.2d 642, 650-651 (Md. 2005)(finding that a lawyer who failed to admit error and concealed the error violated Rule 1.7); New Jersey Supreme Court Advisory Committee On Professional Ethics Opinion, Opinion 684 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (N.J. Adv. Comm. Prof. Eth. March 9, 1998)(citing Rule 1.7 as a source from which a lawyer is required to inform a client that he or she may have a legal malpractice claim).

Rule 1.7 provides that:

(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

   . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.

Comment 1 to Rule 1.7 states that “[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise . . . from the lawyer’s own interests.” Comment 10 states that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” (emphasis added.)

In Attorney Grievance Com’n of Maryland v. Pennington, 387 Md. 565, 876 A.2d 642 (Md. 2005), discussed above, the lawyer was also found to have violated Rule 1.7. The Court determined that a conflict of interest arose as soon as the clients’ complaint was dismissed with prejudice since at that time “the malpractice claim became a reality.” Id. at 651. The court held that even if the lawyer “did not believe a conflict of interest existed, under the Rule she had an affirmative duty to disclose the facts to the client, advise them of their right to seek independent counsel, and obtain a consent before representation of the clients could proceed any further.” Id.

Other authorities are in accord. See Sean T. O’Neil, “If You Make a Mistake, When and What Should You Tell Your Client? ”, The ALPS Risk Management Report, West Virginia Lawyer, 2000-FEB WVLAW 24 (February 2000)(citing Rule 1.7 for the proposition that “[a]dvising a client of a mistake and the client's resultant right to consider a possible substitution of counsel and a suit for malpractice is a difficult decision for most attorneys . . . Still, the client is entitled to know about the mistake and any rights that may flow therefrom”); Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 20 (Winter 2008)( “[l]n addition to the duty to keep the client informed, a lawyer's duty to avoid conflicts between her own and her client’s interests can come into
play after a lawyer has made a mistake. 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’”); Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, Wisconsin Lawyer, 83-FEB Wis. Law. 6, 8 (February 2010)(noting that “[a]nother source for this duty is” Rule 1.7, and “the commission of a serious error normally gives rise to such a conflict and any continued representation requires the client's informed consent”).

The potential for a Rule 1.7 “concurrent conflict of interest” due to the “personal interest of the lawyer” after a mistake was described as follows by one commentator:

The lawyer might want to settle the litigation quickly in order to try and hide his mistake or minimize the damages available to the client in a subsequent malpractice case. Even more likely, the lawyer might want to litigate the case to the end to vindicate his (or his law firm’s) original advice while the client's interest is best served by reaching the quickest and least expensive resolution of the litigation. Because of his tunnel vision, the attorney is not in a position to realistically evaluate the claim asserted against the client or to give independent legal advice that is in the best interest of the client. Rather, the conflicted lawyer becomes fixated on vindicating his or his firm's own position instead of acting in the best interests of the client.

(citations and footnotes omitted). Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 185, Baylor Law Review (Winter 2009), citing Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 21 (Winter 2008).

D. Common Law Fiduciary Obligations

A final source of the duty to admit lawyer error is the common law fiduciary obligation of a lawyer to the client (from which the Rules of Professional Conduct have been said to derive2). “That the confession of error runs contrary to self-interest and human nature, yet may be required, is simply a fact of fiduciary life. ‘Unflinching loyalty to their interests is the duty of every attorney to his clients’.” RFF Family Partnership, LP v. Burns & Levinson, LLP, No. 12–2234–BLS1, 2012 WL 6062740 *5 (Mass. Super. 2012).

As one commentator explained, the “legal notion of lawyer as fiduciary further compels the conclusion that lawyers--who are the ‘quintessential fiduciary’--must report their errors to their clients.” Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 186, Baylor Law Review (Winter 2009); See also Palmer v. Superior Court, 231 Cal.App.4th 1214, 180 Cal.Rptr.3d 620, 634 (Cal App. 2014)(“Furthermore, attorneys have a ‘fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice’”); Beal Bank, SSB v. Arter & Hadden, LLP, 42 Cal.4th 503, 167 P.3d 666 (Cal. 2007) (same); Leonard v. Dorsey & Whitney L.L.P., 553 F.3d 609, 629 (8th Cir. (Minn.) 2009)(“A lawyer's common-law duty to disclose a possible malpractice claim that his client may have against

2 See Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, Baylor Law Review (Winter 2009)(in discussing the lawyer’s duty to admit mistakes, the author suggests that the “Model Rules of Professional Conduct derive from the common law of fiduciary relationships”).

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him is a ‘corollary of the fiduciary obligations of undivided loyalty and confidentiality’ the lawyer owes to his client’); Texas Committee on Professional Ethics Opinion 523 (1997) (“[i]f a lawyer clearly knows that negligent legal advice has been given to a client by another lawyer in the law firm, the lawyer is obligated to take appropriate action to ensure that the client is informed so that remedial action can be taken”).

E. Scope Of The Obligation To Admit Error

There is some variance in the authorities about which “mistakes” must be admitted to the client, how and when such admission must occur, and what the lawyer must do to remedy the mistake after the admission is made. It is generally agreed, however, that not all “mistakes” must be admitted. One bar association ethics committee warned that “an over-broad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship. Also, the ethical duty to disclose should remain primarily a basis for a lawyer’s self-assessment, not another arrow in the quiver of tactics employed in legal malpractice cases.” Colorado Bar Association Ethics Committee Formal Ethics Opinion 113 (November 19, 2005). And as the New York State Bar Association Committee On Professional Ethics discussed in an opinion:

Of course, not every possible error creates a possible claim for malpractice. Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

New York State Bar Association Committee On Professional Ethics, Opinion 734, NY Eth. Op. 734, 2000 WL 33347720 *2 (N.Y. St. Bar. Assn. Comm. Prof. Eth. November 1, 2000); See also Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 195, Baylor Law Review (Winter 2009) (citations and footnotes omitted) (“All professionals—even lawyers (or maybe especially lawyers)—make mistakes sometimes, but few would argue that every single mistake must be reported to the client. Some mistakes clearly should not require reporting while others should. For example, if a lawyer realizes that a brief he filed with the court contains a typo, surely the lawyer is not under an ethical obligation to report that typo to the client. Similarly, if the lawyer can rectify the mistake or the mistake has no significant consequences for the client, then there is nothing to report and no conflict for the lawyer to worry about. By contrast, if a lawyer fails to file his client's complaint in time to meet the statute of limitations, few would argue that the lawyer should not report this mistake to the client”).

Implicit in the Restatement, Rules of Professional Conduct and the common law fiduciary obligations of a lawyer is the expectation that only “material” mistakes potentially harmful to the client and creating a conflict with the lawyer are subject to the reporting obligation. See Colorado Bar Association Ethics Committee Formal Ethics Opinion 113 (November 19, 2005) (“[A] lawyer has an ethical duty to make prompt and specific disclosure to a client of a lawyer’s error if the error is material, meaning that it will likely result in prejudice to a client’s right or claim”); RFF Family Partnership, LP v. Burns & Levinson, LLP, No. 12–2234–BLS1, 2012 WL 6062740 *5 (Mass. Super. 2012) (“[S]urely, a lawyer's discovery that he or his firm has mishandled a matter in a way that is
likely to damage the client's interests meets any reasonable definition of materiality, and must be disclosed”). Others have described the trigger to be where there is an error that is “significant” or “serious”. See Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLLR 174, 197, Baylor Law Review (Winter 2009)(proposing that “the self-reporting duty should arise when the error is one that a reasonable client would find significant in making decisions about (1) the lawyer-client relationship and (2) the continued representation by the lawyer or law firm. As applied to the self-reporting duty, materiality comes down primarily to two things--how bad was the mistake and how much harm did it cause”); Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, Wisconsin Lawyer, 83-FEB Wis. Law. 6, 8 (February 2010)(surmising that “[i]t is thus beyond dispute that a lawyer has an affirmative duty to inform the client when the lawyer has made a serious error”, and then discussing how to determine if there is a “serious error”).

What constitutes “material”, “significant” or “serious” errors sufficient to trigger the duty to admit mistakes to clients may vary. One state bar ethics committee proposed the following standard: “Whether a particular error gives rise to an ethical duty to disclose depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client’s right or claim and that the lawyer therefore has an ethical responsibility to disclose the error.” Colorado Bar Association Ethics Committee Formal Ethics Opinion 113 (November 19, 2005). The New York Bar applied a similar rationale:

As a general rule, whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer’s possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer’s conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim.


In People v. Greene, 276 P. 3d 94 (Colo. 2011), the lawyer filed a wrongful death claim on behalf of his client. Id. at 98. During the course of litigation, various motions and dismissals were granted against the client. Id. The court thereafter ordered the lawyer to file a status report regarding remaining issues and whether the client intended to move forward with the case. Id. The lawyer did not file a status report. Id. A status conference was scheduled, and although the lawyer was served with notice, he claimed he did not see it and did not attend. Id. The court found that the lawyer did not comply with the order, and therefore dismissed the case without prejudice. Id. The lawyer was alleged to have told the client that the case was “denied”, and that the judge did not “agree with the case.” Id. The client was not informed of the failure to comply with court orders, or that the lawyer’s inaction precipitated the dismissal. Id.

In a later grievance proceeding, the lawyer was alleged to have violated Rule 1.4 by failing to properly communicate with the client. Id. at 99. The court noted that it was “troubled” by the lawyer’s poor communication, and that the lawyer “surely could have made plain that he had erred by not filing the status report and missing the status conference. By failing to do so, [the lawyer] acted without the level of professionalism and transparency we would expect.” Id. The court nevertheless concluded
that the lawyer did not violate Rule 1.4. *Id.* In so holding, the court relied upon the previously referenced Colorado Bar Association Ethics Committee’s Formal Opinion 113 (November 19, 2005):

> When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client’s right or claim, the lawyer must promptly disclose the error to the client. “Error,” as used in this opinion, is not meant to include an act or omission that a reasonable lawyer would conclude would not likely result in prejudice to a client’s right or claim.

*Id.* The Greene Court held that while the lawyer indeed made errors, the errors were not likely to prejudice the client’s claim because the clients “claims probably were no longer viable at the district court level when the court ordered [the lawyer] to prepare the status report.” *Id.* Motions against the client had already been granted and, in the Court’s opinion, the status report that the lawyer was required to file would have merely “tie[d] up loose ends . . . the case soon would have been dismissed even if [the lawyer] had filed the status report and attended the status conference.” *Id.* According to the Court, therefore, the lawyer’s “inattention to these court directives, like ‘missing a nonjurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense,’ appears to fall under the category of errors that ‘may constitute grounds for loss of sleep, but not an ethical duty to disclose to the client’.” *Id.*

Similarly, in *Leonard v. Dorsey & Whitney L.L.P.*, 553 F.3d 609 (8th Cir. (Minn.) 2009), the law firm represented a company in connection with casino loan transactions. *Id.* at 614. The case involved (in relevant part) a claim brought by the trustee of the company’s bankruptcy estate against the law firm, alleging that the firm breached its fiduciary duties to the company by failing to disclose acts of malpractice respecting a lack of approval from the National Indian Gaming Commission before closing on a loan. *See id.* at 628.

> The bankruptcy court found that the law firm had breached its “duty to disclose a potential malpractice claim” arising out of Rules 1.4 and 1.7, and ordered disgorgement of attorneys’ fees. The court concluded that the law firm’s continued representation of the company after failing to make the disclosure was limited by the firm’s own interest in avoiding liability for malpractice. *Id.* at 628.

> The Eighth Circuit reversed, concluding that it “believe[d] the bankruptcy court erred by relying too heavily on the Minnesota Rules of Professional Conduct”, while acknowledging that a duty to disclose arises out of the lawyer’s fiduciary obligations. *Id.* at 628-629. With regard to such obligations, the Court predicted that:

> the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client . . . the lawyer must know that there is a non-frivolous malpractice claim against him such that “there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by” his own interest in avoiding malpractice liability.

*Id.* at 629. Finding no conflict of interest present in the lawyer’s handling of the related matters after the alleged error, the court held that the lawyer could not be held liable for failing to disclose his mistake. *Id.* at 630.
The question has also arisen whether the duty to admit error includes a duty to inform the client that he or she has a malpractice action against the lawyer. Some courts have found a duty to admit the mistake, to inform the client of the right to obtain new counsel, and of the right to file a malpractice claim against the lawyer. *Tallon v. Committee on Professional Standards, Third Judicial Dept.,* 86 A.D.2d 897, 447 N.Y.S.2d 50, 51 (N.Y.A.D. 1982)(“An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him”); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla,* 142 N.J. 280, 662 A.2d 509, 514 (N.J. 1995)(“[A]n attorney who realizes he or she has made a mistake must immediately notify the client of the mistake as well as the client's right to obtain new counsel and sue the attorney for negligence”), *overruled on other grounds by Olds v. Donnelly,* 696 A.2d 633 (N.J. 1997); New Jersey Supreme Court Advisory Committee On Professional Ethics Opinion, Opinion 684 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (N.J. Adv. Comm. Prof. Eth. March 9, 1998) (“A client cannot make an informed decision about representation if that client is unaware that the lawyer may have committed malpractice. While we can foresee instances in which a client may well chose not to pursue a malpractice claim, a lawyer cannot decide this issue for a client through nondisclosure. Disclosure is mandated”); *See Sean T. O’Neil, “If You Make a Mistake, When and What Should You Tell Your Client?”* The ALPS Risk Management Report, West Virginia Lawyer, 2000-FEB WVLAW 24 (February 2000) (“Advising a client of a mistake and the client's resultant right to consider a possible substitution of counsel and a suit for malpractice is a difficult decision for most attorneys . . . Still, the client is entitled to know about the mistake and any rights that may flow therefrom”).

Other authorities question whether a lawyer must tell the client that he or she committed malpractice. *See Fitch v. McDermott, Will and Emery, LLP,* 401 Ill.App.3d 1006, 929 N.E.2d 1167, 1184 (Ill. App. 2010)(noting that the court found “no case that would require an attorney to affirmatively advise his client of his negligence and the statute of limitations for suing him”); Colorado Bar Association Ethics Committee Formal Ethics Opinion 113 (November 19, 2005) (“The lawyer need not advise the client about whether a claim for malpractice exists . . . What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client’s rights or claims . . . it may be advisable to inform the client that it may be advisable to consult with independent counsel regarding the statute of limitations on a claim for legal malpractice . . . However, the lawyer need not advise the client of the viability of a legal malpractice claim, but simply inform the client that it may be advisable to seek independent advice from a disinterested lawyer”); Brian Pollock, *Second Chance Surviving A Screwup,* 34 No. 2 Litigation 19 (Winter 2008)(citing Pa. Bar Ass’n Comm. on Legal Ethics and Prof. Resp., Informal Op. 97-56 (1997) for the proposition that “a lawyer need only disclose to the client the consequences of his mistake and not the mistake itself”). Authorities resistant to the notion that lawyers must disclose that they committed malpractice identify the potential conflict of interests inherent in such disclosure. *See Colorado Bar Association Ethics Committee Formal Ethics Opinion 113 (November 19, 2005)*(stressing that “indeed the lawyer’s conflicting interest in avoiding liability makes it improper for the lawyer to” advise the client about the malpractice). One commentator reasoned:

Certainly, an attorney should tell his client about the factual aspect of a mistake as soon as possible after making the mistake. He also should inform his client that she may want to consult another attorney to examine her rights in view of the mistake. However, we believe that it would be imprudent for him to go so far as to advise his client that she has (rather than may have) a malpractice action available to her. The
client's malpractice cause of action generally does not accrue until her attorney's error has caused her damages. This means that the attorney has a conflict of interest in the issue of whether his mistake caused damages to his client. For this reason, the attorney should not advise his client regarding whether she has a malpractice cause of action against him.


F. Use Of An Admission In A Subsequent Malpractice Lawsuit

Admitting a mistake may be the impetus for the client to pursue a malpractice action, and in some jurisdictions the admission constitutes as an admission of a party opponent that the lawyer’s conduct fell below the standard of care. But the admission may also reduce the number of ethics violations against the lawyer and may limit other potential claims independent of the malpractice itself, including claims for breach of the fiduciary duty, punitive damages, emotional distress damages and disgorgement of the lawyer’s fees. An outline of cases addressing these issues follows.

1. The admission of error may be admissible in a subsequent malpractice action

“[W]hether an attorney’s statements in the course of representation of a client may be used against the attorney in subsequent legal malpractice litigation has not been the subject of many reported decisions.” Heinze v. Bauer, 145 Idaho 232, 178 P.3d 597, 602 (Idaho 2008). The extent to which a lawyer’s acknowledgement that he or she made a mistake potentially becomes an admission of a party opponent in a subsequent malpractice action implicates the rules of evidence (particular to each jurisdiction). We do not intend to address all of the intricacies of the evidentiary questions raised when a lawyer affirmatively admits to error, but identify below various cases addressing the issue and policy considerations which have been raised therein.

a. Admission Held Inadmissible


In Smith, a lawyer representing his client in a divorce matter moved to amend a final divorce decree to correct a mistake made in the pleadings regarding community property. Id. at 592. The motion asserted that certain retirement benefits were a community asset, but were not pled due to the lawyer’s “mistake, inadvertence, and excusable neglect.” Id. In a subsequent malpractice action, the trial court admitted the statement as an admission of a party opponent. Id. at 599. The appellate court reversed, in part based upon its finding that “extrinsic policy reasons exist for excluding the declaration from evidence.” Id. at 599. The court reasoned:

Were we to sanction the admissibility of such evidence, tension might develop between an attorney's duty to zealously represent his client . . . and his instinct of self-protection. As a result, the attorney could become reluctant to seek an amended judgment . . . and the quality of legal representation in the state might suffer
accordingly. In short, an attorney should be able to admit a mistake without subjecting himself to a malpractice suit.

Id. at 599.


In **Heinze**, a property and debt stipulated settlement was entered in a divorce action. *Id.* at 599. After the settlement, the client expressed misgivings about the settlement. *Id.* At his client’s request, the lawyer filed a motion to set aside the settlement. *Id.* at 599. In the motion, the lawyer stated that there had been “errors which have come to light” and that the client “has identified significant errors in the document used as the basis for the stipulation.” *Id.* at 602. In a subsequent malpractice action, the client sought to use the statements to contradict the lawyer’s contention that the client had full knowledge of the errors at the time he agreed to the settlement. *Id.*

The court found that “statements made on behalf of a client in the course of representation are not personal admissions that may be used against the attorney in subsequent litigation.” *Id.* at 603. The court reasoned:

Attorneys owe fundamental duties to their clients. Among the most important of these duties are the duties of zealous representation and loyalty. [Cits.] Indeed, the United States Supreme Court has characterized this duty of loyalty as “perhaps the most basic of counsel's duties” . . . If statements and arguments made by counsel in furtherance of a client's claim were routinely deemed to constitute binding admissions against a lawyer in a subsequent legal malpractice action, it could conceivably have a chilling impact upon the vigor and resulting effectiveness of counsel’s advocacy.

*Id.* at 603.


In **Tidewater**, a lawyer mishandled loan transactions and security agreements, but the law firm refused to indemnify the client for its losses. *Id.* at 30-31. The client met with another member of the law firm to discuss settling the malpractice claim. *Id.* at 35. The parties reached an agreement in which the client would agree to a cap on damages if the law firm would “admit to its negligence malpractice insurance carrier that it had made a mistake and would assert that position to its malpractice carrier.” *Id.*

The jury was allowed to hear that the law firm admitted to the insurance carrier that it had committed malpractice. *Id.* The appellate court reversed, finding that the firm’s offer to admit it’s negligence to the insurance carrier was not an express admission of liability but rather, an inadmissible effort to settle the controversy. *Id.*

b. **Admission Held Admissible**

•  **Greenstreet v. Brown**, 623 A.2d 1270 (Me. 1993)
In Brown, the lawyer representing his client in a divorce action failed to respond to a motion by the spouse to amend a divorce judgment and failed to inform his client about the motion.  Id. at 1272.  The motion was granted and the client learned of it two years later.  Id.  The lawyer then advised the client that he had “made a mistake” and said he would pay the client money “to make amends for his conduct.”  Id.

In a subsequent malpractice action against the lawyer, the question of the admissibility of the lawyer’s admission of the error arose.  Id.  Rejecting an argument by the lawyer that he made the admission in the context of compromise or negotiation of a settlement for the prospective malpractice action, the court held that the statement was properly admitted into evidence because, at the time made, the lawyer’s statement informed the client “for the first time about facts that might give rise to a claim” but “[s]ince there is no evidence that a dispute existed about the validity of a claim or the amount claimed at the time of [the lawyer’s] admission, the trial court properly admitted [the lawyer’s] statement in evidence.”  Id.


In Bethune, the lawyer represented a client in a construction case.  Id. at 131.  The jury returned a verdict in the client’s favor on an implied warranty claim but found against the client on an express warranty claim.  Id.  Thereafter, the lawyer allegedly admitted to his client that he “screwed up” in preparing and in trying the breach of warranty claim.  Id.  The client sued for malpractice.  In rejecting a motion for summary judgment filed by the lawyer, the court held that the admission was sufficient to defeat the motion.  Id.  The court found that “even in the absence of expert testimony, evidence of admissions by [the lawyer] that he ‘screwed up’ both in the preparation of his client's case and in the conduct of the trial is sufficient to defeat [the lawyer’s] motion for summary judgment.”  Id.  Viewing the admission in the light most favorable to the client, the court concluded that there was a genuine issue of material fact as to whether the lawyer was negligent.  Id. at 132.

- Hicks v. Nunnery, 253 Wis.2d 721, 643 N.W.2d 809 (Wis. App. 2002).

In Nunnery, a lawyer representing a criminal defendant submitted an affidavit admitting errors in his client’s post-conviction ineffective assistance of counsel proceedings.  Id. at 830.  The client successfully introduced the affidavit as evidence in a subsequent malpractice trial.  Id.

The lawyer claimed in part that “[t]o promote full representation of the client in the underlying criminal action and the cooperation of the attorney in that representation, good public policy” dictated that his affidavit be excluded from evidence in the malpractice case.  Id. at 830.  He also contended that if the admission was allowed, there would be “a chilling effect on criminal defense counsel, seriously inhibiting the vigorous representation of their clients post-trial.”  Id.  The Wisconsin Court of Appeals disagreed, focusing primarily upon the fact that the lawyer had an obligation to always tell the truth:

“[W]e see no reason why testimony an attorney might give during postconviction proceedings should be inadmissible in a subsequent malpractice trial.  As we have discussed, the attorney is obligated to speak the truth in both proceedings, regardless of whether the testimony in the former may ultimately be against the attorney’s interests in the latter.  On balance, we conclude that the better public policy is to treat
attorneys no differently than other witnesses whose sworn statements may later be introduced as admissions against them.

Id. at 830-831.

The Nunnery court identified public policy considerations “expressed in some quarters that are the exact opposite of the policy arguments” advanced by the lawyer, for example, that “criminal defense attorneys will too often readily admit to deficiencies in their representation during post-conviction proceedings, perhaps out of regret over a less than desirable outcome or a sense of continuing loyalty to their former clients.” Id. at 831, n.17. The court implicitly concluded that finding the affidavit admissible in a malpractice case may have the desired effect of causing criminal defense attorneys to think twice before “too often readily admit[ing]” to deficiencies that may not in fact exist. See id.

2. The admission of error may limit the ethical violations disclosed to a jury in a malpractice trial

While it has been said that ethics violations “standing alone, cannot serve as a legal basis for a legal malpractice action”, and while ethics violations generally “cannot provide the sole basis for the standard of care applied in a legal malpractice action”, courts have recognized that “a large majority of courts treat professional ethical standards as evidence of the common law duty of care.” Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 453 S.E.2d 719, 720-721 (Ga. 1995)(“[W]hile the Code of Professional Responsibility provides specific sanctions for the professional misconduct of the attorneys whom it regulates, it does not establish civil liability of attorneys for their professional misconduct, nor does it create remedies in consequence thereof”, but “it may be ‘a circumstance that can be considered, along with other facts and circumstances’” in a malpractice action)3; RFF Family Partnership, LP v. Burns & Levinson, LLP, No. 12–2234–BLS1, 2012 WL 6062740, *5, n.11 (Mass. Super. 2012)(in a legal malpractice action alleging that the lawyers made mistakes in connection with property loans and agreements, the clients were allowed to claim that the lawyers had breached a duty to disclose that they committed malpractice, noting that “although an ethical violation is not malpractice per se, it ‘may be some evidence of the attorney’s negligence’”); Leonard v. Dorsey & Whitney L.L.P., 553 F.3d 609, 628 (8th Cir. (Minn.) 2009)(“[demonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached . . . There is a distinction between a disclosure of an ethical concern and the existence of a cause of action”); 5 Litigating Tort Cases § 64:22, Legal ethics and the model rules (Database updated August 2014)(citing the ABA Model Rules of Professional Conduct for the proposition that while a violation of a Rule should not form an

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3 The Allen Court addressed the different approaches courts have taken in handling ethics violations in malpractice cases, with the majority treating violations as some “evidence of the common law duty of care”, some others finding such evidence as constituting negligence per se, others finding it to establish a “rebuttable presumption of legal malpractice”, and even one finding such evidence inadmissible. The Court also discussed in some detail the circumstances under which such evidence would be relevant. We do not address all of the nuances here, and simply point out that a lawyer should study the applicable jurisdiction’s position on the relevance, if any, of ethics violations in a malpractice case.
independent basis for liability, the lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct); Christian and Christian, Twice Bitten: Violations Of Ethical Rules As Evidence Of Legal Malpractice, 28-SPG Brief 62, 63 (Spring 1999)(“Attorneys who still believe that the violation of an ethical rule can only be used against them in a disciplinary proceeding are mistaken. Of courts that have addressed the issue, the overwhelming majority hold that evidence of an ethical violation is admissible in a malpractice action”).

Some courts warn against placing too much reliance upon ethical violations in legal malpractice cases. See Hizey v. Carpenter, 830 P.2d 646, 651-654 (Wash. 1992)(holding that the plaintiff could not rely upon an alleged ethical violation as evidence to support a claim that the legal standard of care was breached, reasoning that there are great distinctions between what constitutes an ethical obligation and what constitutes the legal standard of care in a malpractice action and that “breach of an ethics rule provides only a public, e.g., disciplinary, remedy and not a private remedy”); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366, 369 (Ark. 1992)(in affirming the trial court’s refusal to introduce the rules of professional conduct, the court reasoned that “[t]he Rules are not designed for a basis of civil liability, but are to provide guidance to lawyers and to provide a structure for regulatory conduct through disciplinary agencies. No cause of action should arise from a violation, nor should it create any presumption that a legal duty has been breached”); Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 453 S.E.2d 719 (Ga. 1995), Benham, Presiding Judge, concurring (“Although the main opinion might contemplate that the Code of Professional Responsibility will make a cameo appearance in malpractice cases, I fear that experience will show that it will play a leading role and the cast of horrors that will attend the allowance of such evidence will be legion. . . . I fear also that many professions, in prudent response to the majority opinion, will throttle back on their ethical requirements”).

3. The admission of error may prevent or diminish additional damages outside those caused by the error itself

a. Disgorgement of Attorneys’ Fees

While ethical violations may not support an independent cause of action separate and apart from the malpractice action, to the extent a breach of the duty to disclose is a breach of the lawyer’s fiduciary obligations, the client may have two causes of action against the lawyer: one for the underlying mistake, and another for the breach of the obligation to admit its commission. See RFF Family Partnership, LP v. Burns & Levinson, LLP, No. 12–2234–BLS1, 2012 WL 6062740, *5 (Mass. Super. 2012)(“It also appears that a majority of jurisdictions that have faced the question of tort liability for an attorney’s concealment of a significant mistake have found such claims viable, whether presented as straightforward legal malpractice or as a breach of fiduciary duty”); Cecala v. Newman, 532 F.Supp.2d 1118, 1134 (D. Ariz. 2007)(recognizing that a lawyer may be liable for negligence in departing from the applicable standard of care, may liable for breaching his fiduciary obligations, “or both”); Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 209-210, Baylor Law Review (Winter 2009)(“Disenchanted clients may assert two distinct claims against their lawyers—one for professional negligence and a second for breach of fiduciary duty”).

A claim for breach of a fiduciary duty for concealing a mistake can have a significant impact on the damages awarded in a malpractice case. While the malpractice claim may involve only those
damages resulting from the malpractice (e.g., the value of the client’s case had the lawyer filed within the statute of limitations); a claim involving the breach of the lawyer’s fiduciary obligations to the client may result in additional damages, including fee disgorgement of all fees earned (even those legitimately earned). “The theory behind this is that the client is paying the lawyer to be his loyal agent and fiduciary; if the lawyer breaches a fiduciary duty of loyalty to the client i.e. fails in his role as fiduciary, he does not deserve to be compensated even if the client has otherwise benefited from the lawyer’s work.” Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 212, Baylor Law Review (Winter 2009); Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19 (Winter 2008)(“The threat of fee forfeiture or disgorgement can be a powerful tool for malpractice plaintiffs . . .”).

Some have suggested that fee disgorgement may be proper in a breach of fiduciary duty case, even in the absence of damage. Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 211-212, Baylor Law Review (Winter 2009)(“Many courts have recognized that when a lawyer breaches a fiduciary duty to a client, the client is entitled to certain remedies--principally fee forfeiture—even in the absence of proof that the violation of the fiduciary duty gave rise to damages”), citing Charles W. Wolfram, A Cautionary Tale: Fiduciary Breach As Legal Malpractice, 34 Hofstra L. Rev. 689 (Spring 2006)(citing Hendry v. Pelland, 73 F.3d 397 (C.A. D.C. 1996)(“to the extent they sought disgorgement of legal fees, they needed to prove only that [the lawyer] breached his duty of loyalty, not that his breach proximately caused them injury”)) and Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So.2d 947 (Fla. App. 1993)(noting that “forfeiture may be justified even though no harm was suffered or the harm was of little consequence. One of the justifications for forfeiture is that it is sometimes difficult to ascertain the harm a lawyer’s misconduct may have caused. The harm may be intangible, such as the client's loss of trust in the lawyer’s loyalty and good faith”).

There is authority resisting disgorgement of attorneys’ fees based solely upon a breach of fiduciary obligations in the absence of harm. In Leonard v. Dorsey & Whitney L.L.P., 553 F.3d 609 (8th Cir. (Minn.) 2009)(as discussed above), the law firm made mistakes in connection with loan transactions involving a casino. The law firm continued representing the clients without disclosing that it had made a mistake. The bankruptcy court held that the law firm had breached its fiduciary duties of loyalty and full disclosure, and ordered disgorgement of attorneys’ fees, finding that the law firm’s continued representation of the company after failing to make the disclosure was limited by the firm’s own interest in avoiding liability for malpractice.

The Eighth Circuit reversed, finding a duty to disclose under certain circumstances founded upon the lawyer’s fiduciary obligations, but concluding that those circumstances had not arisen in the case. As the court reasoned, “[n]egligent legal advice does not give rise to a claim for legal malpractice until the client suffers damages as a result. [Cits] It follows that a lawyer's duty to disclose his own errors must somehow be connected to a possibility that the client might be harmed by the error. For a fiduciary duty to be implicated, the lawyer's own interests in avoiding liability must conflict with those of the client. A lawyer may act in the client's interests to prevent the error from harming the client without breaching a fiduciary duty.” Id. at 629-630. Finding that the law firm’s work after the mistake “was part of its legitimate efforts to prevent its possible error in judgment from harming [the client]; there was not a substantial risk that [the lawyer’s] interests were adverse to those of [the client]”. Id. at 630.
b. **Punitive Damages**

Admitting to error may potentially avoid or reduce the likelihood of a punitive damages award in a malpractice case in jurisdictions where such damages are permitted. A failure to admit a mistake (especially when combined with concealment), potentially exposes the lawyer to a claim for punitive damages, even if the original “mistake” did not itself involve conduct rising to the standard necessary for punitive damages. *See* Benjamin P. Cooper, *The Lawyer’s Duty To Inform His Client Of His Own Malpractice*, 61 BLRLR 174, 212-213, Baylor Law Review (Winter 2009)(citations omitted.) (“[A] failure to self-report may open up the lawyer to a claim for punitive damages because of the lawyer’s dishonesty in hiding (or at least failing to disclose) his malpractice. Generally, a legal malpractice plaintiff may not obtain punitive damages without demonstrating that the lawyer acted with ‘an improper intent, typically fraud, malice or oppression,’ but a claim that the lawyer failed to disclose his malpractice could make punitive damages more likely to meet this standard”); *See also* Brian Pollock, *Second Chance Surviving A Screwup*, 34 No. 2 Litigation 19, 22 (Winter 2008)(surmising that “[i]f a plaintiff, however, can pile on allegations that the lawyer breached his fiduciary duties and in particular concealed his wrongdoing, punitive damages become more likely” citing Ronald E. Mallen & Jeffrey M. Smith, § 3 Legal Malpractice at 20.16, at 53 (2006 ed.) (“A breach of a fiduciary obligation often is alleged to support a punitive damage claim”).

There are cases addressing the validity of a punitive damage award where the lawyer engages in efforts to conceal a mistake, as illustrated below.


  In *Slosberg*, the client was declared the father in a paternity proceeding, and was ordered to pay past and future child support. *Id.* at 659. The client retained the lawyer to appeal the ruling, upon the lawyer’s assurances that he had a 30 percent chance of prevailing. *Id.* For the next two years, the client engaged in regular contact with the lawyer, meeting with him between ten and twenty times to discuss the case. *Id.* Throughout this time period, the client thought his appeal was pending. *Id.* at 660. Two years after the paternity ruling, the client learned (from a different lawyer) that the appeal had been dismissed due to the lawyer’s failure to file an appellate brief. *Id.*

  The client thereafter pursued a malpractice action, seeking damages in the amount of the ordered child support. He also sought other damages, including punitive damages and damages for emotional distress. *Id.* at 659-660. A default judgment was entered against the lawyer for failing to comply with a discovery order, and a trial was held on damages. *Id.* at 659. The trial court granted the lawyer’s motion for judgment as a matter of law on the claim for the damages related to child support. *Id.* at 660. But the court allowed the client’s claims for punitive damages and emotional distress, and a judgment was in the client’s favor for almost $30,000. *Id.* at 659-660.

  The Supreme Court of Maine affirmed, holding that punitive damages were recoverable if the client demonstrated that the defendant acted with malice. *Id.* at 660. For that claim, the client alleged (and by default it was admitted) that the lawyer “acted with malice when making intentional misrepresentations concerning the status of the appeal.” *Id.* at 660.

- **Metcalf v. Waters**, 970 S.W.2d 448 (Tenn. 1998)
In Metcalfe, the client’s case was dismissed due to the lawyer’s errors. Rather than admit to the mistake, however, the lawyer misrepresented the status of the case. See id. at 449. When he eventually notified his clients that a dismissal had been entered, he did not state the reason, saying only that the case was not worth appealing. Id. at 450.

In a subsequent malpractice action, the lawyer admitted to the mistake, and even admitted that the failure to inform his clients of the dismissal “was an intentional, fraudulent, malicious, or reckless effort to conceal his mistakes.” Id. at 450. He denied, however, that such conduct supported the jury’s award of $100,000 in punitive damages. Id. The lower appellate court agreed with the lawyer, finding that the lawyer’s initial malpractice involved negligence only. Id.

The Tennessee Supreme Court reversed, finding that the punitive damages awarded for the lawyer’s acts of concealing his mistakes after they were committed were appropriate and permissible. See id. at 451-452. The Court found that “the harm resulting from the original wrongdoing, as in the present case, may be exacerbated by intentional, fraudulent, malicious, or reckless efforts that prevent the plaintiff from taking immediate corrective action.” Id. at 452.

At least one commentator has warned: “The possibility of punitive damages is particularly significant since many malpractice insurers do not cover punitive damages. As a policy matter, the potential of paying punitive damages out of pocket should have the salutary effect of encouraging lawyers to self-report.” Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BLRLR 174, 212-213, Baylor Law Review (Winter 2009); See also Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 22 (Winter 2008)(“The increased exposure to punitive damages is particularly significant for lawyers in states with a public policy forbidding a lawyer from insuring against punitive damages . . . In such states, a lawyer’s improper handling of a mistake could subject him to significantly increased personal exposure”). Admitting to a mistake in a timely manner eliminates a possible claim for punitive damages based upon the lawyer’s conduct in handling the mistake.

c. Emotional Distress Damages

While emotional distress damages are generally “unavailable to a plaintiff in a run-of-the-mill legal malpractice action . . . [a] lawyer’s breach of fiduciary duties to the client by failing to disclose a mistake, however, could constitute just the type of conduct that would convince a court to allow the client to seek emotional distress damages.” Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 21-22 (Winter 2008). It appears that even if a lawyer eventually admits to a mistake, the preceding period of time during which the lawyer fails to do so potentially supports a claim for mental anguish damages. A summary of cases addressing this issue is addressed below.


In Beis, the lawyer agreed to represent the client in a medical malpractice claim. Id. at 1095. The lawyer allegedly told the client she “very definitely” had a medical malpractice claim. Id. at 1096. The Medical Review panel found, however, that the physician was not negligent. Id. at 1095. The lawyer did not advise the client of the panel’s opinion, and did not timely file the medical malpractice lawsuit within 90 days of the panel’s opinion. Id.
The client asserted that weeks and months passed without any contact from the lawyer, despite her attempts to make contact. *Id.* at 1096. The client was very upset and aggravated by the lawyer’s non-responsiveness (which was exacerbated by other personal issues). *See id.* at 1096-1097. The lawyer finally wrote to the client four months after the panel’s opinion was issued and admitted that the claim was barred (indicating that the firm would have recommended against filing it in any event). *Id.* at 1096. The lawyer suggested that the client could pursue a legal claim against the firm. *Id.*

Though the client could not find an expert to testify that she ever had a viable medical malpractice claim, a claim for emotional distress against the lawyer was allowed to proceed to a jury based upon the alleged mental anguish caused by the lawyers ignoring her and failing to keep her informed, leaving the client to believe she had a viable claim for four months. *Id.* at 1096-1097. As the concurring judge described:

There remains, however, plaintiff's claim for “emotional stress and strain” taxed not on the actual loss of the medical malpractice claim but on [the client’s] allegations that the [the lawyers] assured her she “very definitely” had a medical malpractice claim, that her attorneys would not return her phone calls nor advise her of the status of her claim, and that in her post-stroke condition she was advised that her medical malpractice claim had prescribed but that she had no claim to begin with and she had no choice but to retain another attorney to determine whether she had a medical or legal malpractice claim. Given the peculiar history of the matter, [the clients] have a right to prove [their] damages were “real and substantial” and therefore summary judgment on this issue is inappropriate.

*Id.* at 1099. *But see Whittington v. Kelly*, 917 So.2d 688 (La. App. 2005)(calling Beis into doubt in a case where there was no underlying malpractice shown).


In *Slosberg* (as discussed above), the lawyer mishandled the client’s appeal in a paternity matter. For a two year period, the client was made to believe the appeal was pending when it had actually been dismissed due to the lawyer’s failure to file an appellate brief. *Id.* at 659-660. The evidence showed that “[t]hroughout the [two year] period that McAlister believed his appeal to be pending, he felt constant concern about the appeal, anxiety, headaches, stomach aches and cramping, and was on medication. These symptoms did not subside until several months after he had learned the appeal had been dismissed.” *Id.* at 660.

Although the main malpractice claim was found unsupportable, the client was awarded a verdict for punitive damages and emotional distress. With respect to the emotional distress claim, the Maine Supreme Court affirmed the judgment holding that the client could “recover damages for severe emotional distress arising out of a legal malpractice action.” *Id.* at 660. As for this claim, “[t]he client had alleged that he suffered emotional distress as a proximate result of the lawyer’s ‘intentional misrepresentations of the status of his appeal’”, which by virtue of the default, was to be deemed true. *Id.* at 660.

d. **General Damages In The Malpractice Case**
A significant consequence of failing to admit error is that it “is likely to make the lawyer and law firm look bad in front of the ultimate decision maker in the malpractice trial and make it more likely that the law firm will lose the underlying malpractice case. As strong as the law firm's defense of the underlying malpractice might be, a jury might be influenced by the lawyer's lack of candor in failing to self-report.” Benjamin P. Cooper, *The Lawyer’s Duty To Inform His Client Of His Own Malpractice*, 61 BLRLR 174, 213, Baylor Law Review (Winter 2009). It is widely acknowledged that a lawyer who seeks to conceal his or her mistakes merely compounds his or her troubles:

And like a parent more upset about a child's cover-up than the mistake the child was trying to hide in the first place, a jury presented with allegations that a lawyer hid his alleged mistake is more likely to hold the lawyer liable for the mistake and to be skeptical of anything else the lawyer has to say.

Brian Pollock, *Second Chance Surviving A Screwup*, 34 No. 2 Litigation 19, 23 (Winter 2008). Candor on the other hand may ease the ire of the judge or jury, or cast the lawyer in a more favorable light in the eyes of the fact finder.

### G. Affect of Admitting Error on Subsequent Disciplinary Proceeding

As addressed above, a lawyer who fails to admit error may run afoul of the rules of professional conduct, thereby further subjecting the lawyer to professional discipline. A lawyer who continues to resist acknowledgment of error before the state disciplinary board is generally detrimental.

Where a member of the bar is charged with delinquencies . . . there is but one course open to him—to come forward frankly and make such truthful explanations as he may, and with equal frankness admit his mistakes. It does not profit him before this court to rely upon technical defenses or employ sophistry in argument in an attempt to establish a superficial justification.

*Matter of Feinstein*, 233 A.D. 541, 542-543, 253 N.Y.S. 455 (N.Y.A.D. 2 Dept. 1931)(ordering a one year suspension for a lawyer who was known to bully other lawyers, use aggressive litigation tactics, and present inappropriate excuses for his conduct).

In *Idaho State Bar v. Clark*, 283 P.3d 96, 99 (Idaho 2012), a lawyer mistakenly failed to submit his client’s request for a certain show cause hearing with the proper tribunal. After the error, the lawyer made improper excuses and lied to his client as well as the Bar. He also engaged in other misconduct, including attempting to induce the client to sign an affidavit to recant allegations of misconduct. The court suspended the lawyer from the practice of law for three years, stressing that had the lawyer “simply been honest with his client, admitted to his mistake and attempted to plea bargain . . . this matter would likely not have proceeded as it has to this point.” *Id.* at 104. See also *The Florida Bar v. Varner*, 992 So.2d 224, 231 (Fla. 2008)(choosing to impose a longer suspension than recommended by the referee and Bar, finding that the lawyer engaged in deceptive practices to cover up his mistakes instead of admitting them, and that the lawyer “fails to grasp the concept of honesty”); *Attorney Grievance Com’n of Maryland v. Ward*, 396 Md. 203, 913 A.2d 41, 49 (Md. 2006)(where lawyer hired to open an estate and file a lawsuit made a series of errors (and some misrepresentations) and took actions to conceal his errors, the Supreme Court of Maryland disbarred
the lawyer, relying in part upon the hearing court’s observation that: “Many of the [the lawyer’s] violations [of the rules of professional conduct] could have been avoided if he would have admitted to his client his lack of experience and/or qualifications. With each mistake the [lawyer] reached the point of falsehoods and misrepresentations which were identified in the end”); In re Discipline of Dorothy, 605 N.W.2d 493, 505 (S.D. 2000)(imposing a harsher discipline than recommended below, noting as follows: “We take into serious consideration the fact [the lawyer] refuses to acknowledge and admit his misconduct”).

The lawyer who admits his or her error on the other hand avoids violating the ethical duty to disclose, and may offer the admission itself as a mitigating factor in the tribunal’s consideration of the appropriate discipline to be imposed for the professional violation. In some instances, a lawyer’s candor and ability to admit mistakes (both before the grievance is filed and in the proceeding itself) has been considered a mitigating factor in determining the discipline to be imposed. See e.g., Matter of Yee, Case No. 12–O–13204, 2014 WL 3748590, *4 (Cal. Bar Ct. May 21, 2014)(“Spontaneous candor and cooperation with the State Bar is a mitigating circumstance”); Cotton v. Mississippi Bar, 809 So.2d 582, 587 (Miss. 2000)(“Under the ABA Standards, full and free disclosure to the disciplinary board or cooperative attitude toward the proceedings is a mitigating factor”); Attorney Grievance Com’n of Maryland v. Fox, 417 Md. 504, 11 A.3d 762, 782 (Md. 2010)(listing mitigating factors, including “timely good faith efforts to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings”).

In Matter of Yee, Case No. 12–O–13204, 2014 WL 3748590, *1 (Cal. Bar Ct. May 21, 2014), for example, the lawyer affirmed that she completed her CLE requirements, and after a random audit, realized that she was mistaken about the dates of attendance. She stated that at the time she made the affirmation, she believed she had complied, but that in reviewing her records, a mistake was discovered. Id. at *2. She admitted that her records were “lacking” and accepted responsibility for her “error in memory and recordkeeping.” Id. She admitted that she did not verify her records before submitting the compliance card, and testified that she regretted her conduct. Id. She addressed corrective actions she would take to avoid the problem in the future. Id.

While a 30 day suspension had been recommended, the Court held that the lawyer would only be subject to public censure, finding that she was “entitled to mitigation credit for admitting her misconduct to the investigator before trial and at the hearing below, and for stipulating to certain facts and to admission of all exhibits.” Id. at *4. The court held that “the most significant feature of this case is that [the lawyer] immediately accepted responsibility for her wrongdoing, rectified the situation, and implemented a corrective plan to avoid future problems.” Id. at *5.

Mitigation is not always the outcome when a lawyer admits his or her mistakes, even for the lawyer who is candid from the outset. There are several factors at play in grievance matters, and

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4 Other factors may aggravate or mitigate the discipline to be imposed, including the lawyer’s experience and prior record of discipline. See, e.g. In re Menton, No. 10–31635, 2011 WL 2038976, *4 (Bkrtcy. N.D.N.Y. May 24, 2011)(in recommending harsh discipline, the court noted that the lawyer had been recently sanctioned for similar conduct and his conduct was “not those of a naive actor who has recently achieved bar admission but an attorney who by his own admission has been practicing bankruptcy law for ten years”); Statewide Grievance Committee v. Lafferty, No. CV
courts possess a measure of discretion in determining discipline for lawyers. While a lawyer presumably should be better off exhibiting full candor, that is not always the outcome. The following is a summary of some of the more noteworthy rulings in grievance cases in which the lawyer admits to error.

1. Cases where admitting error is a mitigating factor, even after active concealment


In *Kenney*, an inexperienced lawyer made mistakes in representing his clients in connection with real estate transactions. *See id.* at *1*. Due to the errors, the clients were at risk of losing their deposits when the closing of the transactions were jeopardized. *Id.*

Rather than tell his clients about his mistakes, the lawyer attempted to fix them by making payments from his own funds. *Id.* He also lied to his clients about having instituted a lawsuit to recoup their deposits, and instead used funds from his own account. *Id.* He eventually admitted his mistakes and paid his clients (out of his own funds) for their malpractice claim against him. *Id.*

Despite determining that the lawyer did not comply with the ethical standards of his profession and violated the rules of professional conduct, the court only imposed a formal reprimand and appointed a mentor to work with the lawyer. *Id.* at *2-3*. The court found that the lawyer “has not shirked his responsibility to his client; he has admitted his mistake and voluntarily made payments to them on claims they asserted for damages they may have incurred.” *Id.* at *2*.


In *Soto*, an inexperienced lawyer mishandled a real estate sale. In his answer to a Bar grievance complaint, the lawyer admitted that he committed an error of law (which he deemed excusable), he accepted that he “should have been more diligent”, and that he should have investigated the information he was relying upon with more scrutiny. He also took steps to correct his mistake and prevent damage to client’s interests.

Although finding that the lawyer’s “conduct correcting his mistake does not free him from ethical responsibility”, the court imposed a punishment of censure, and urged him to improve his performance with further study.

The court reasoned that “[t]he fact that there was neither malicious intent nor prejudice for the client undoubtedly weighs on the determination of this count, and the respondent's considerable professional effort to, although *a posteriori*, comply with the order of the court is also an extenuating factor.” In rejecting a harsher punishment, the court quoted Justice Marshall, Chief Justice of the United States Supreme Court in the case *In Ex Parte Burr*, who stated: “The profession of an attorney 00070144S, 2000 WL 1474880, *4* (Conn. Super. 2000)(in recommending a six month suspension, the court emphasized that it was “concerned that the [lawyer] has been reprimanded on three separate occasions since 1993”).

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is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him.” *Id.*, citing *Ex parte Burr*, 22 U.S. 529, 1824 WL 2718 (U.S. 1824).


In *In re Tishberg*, the lawyer filed a personal injury lawsuit on behalf of his clients, but failed to effect timely service. *Id.* at *2*. The lawsuit was dismissed with prejudice. *Id.* The lawyer did not advise his clients that the lawsuit was dismissed, but instead told his clients (over the course of the next six years) that he was negotiating a settlement. *Id.* He apparently “repeatedly represented” to his clients that the case could settle for $12,000. *Id.* The lawyer planned to use fees he anticipated receiving from another client to fund a payment to his clients as a purported settlement, in order to prevent his clients from discovering the dismissal. *Id.*

The clients filed a Bar grievance, in the course of which the lawyer finally admitted that the lawsuit had been dismissed. *Id.* The clients engaged counsel to pursue a malpractice claim against the lawyer, and the lawyer settled the claim with funds from his personal retirement account. *Id.*

In connection with the grievance, the lawyer stipulated to the allegations and stipulated that his misconduct included violations of several of Wisconsin’s Rules of Professional Conduct. See *id.* at *2*-3. The lawyer “conceded his misconduct but argued that a reprimand was the appropriate sanction.” *Id.* at *1.*

The referee handling the disciplinary hearings agreed, recommending issuance of a public reprimand, finding that suspension would be “disproportionately harsh”. *Id.* at *3.* The referee noted several “mitigating factors”, including the fact that the lawyer had practice for 24 years without disciplinary problems, the lawyer admitted his mistakes and was remorseful for such mistakes, the lawyer performed *pro bono* work and had “many positive character traits”, the lawyer withdrew money from his personal retirement account to settle the claim, and the lawyer did not collect any fees or disbursements related to the lawsuit. *Id.*

Agreeing with these recommendations, the Wisconsin Supreme Court found that the lawyer’s attempts to cover up the effects of his failure to timely serve [his client’s] personal injury lawsuit were undeniably foolish. However, there is no evidence that [the lawyer] attempted or expected to obtain any personal gain as a result of his conduct. In addition, because [the lawyer] used his own retirement funds to pay [his clients] the apparent value of their personal injury claim plus their subsequent attorney fees, there was no monetary loss to the client. [The lawyer] cooperated completely in the investigation of this matter, has expressed genuine remorse for his misconduct, and has no previous history of misconduct. Under these circumstances, we are satisfied that a public reprimand of [the lawyer] is sufficient to impress upon him the seriousness of his professional misconduct and to protect the public from similar misconduct in the future.

*Id.* at *3.*
2. Cases where admitting error after active concealment is not a mitigating factor


In *In re Vaughn*, the lawyer failed to ensure that a deed to secure a debt was recorded. *Id.* at 463. In an effort to conceal the mistake from his client, the lawyer photocopied a file stamp from the court clerk’s office to make it appear that the deed was recorded, and forwarded the “falsely-stamped deed to his client under the pretense that it had been recorded.” *Id.* When charged with a formal complaint before the state Bar, he fully admitted to his misconduct. *Id.*

The State Bar recommended a one year suspension, but the special master recommended a six month suspension, noting as mitigating circumstances that the lawyer “made full and free disclosure and displayed a cooperative attitude”, showed “genuine remorse”, he had been suffering from personal and emotional problems and he was inexperienced. *Id.* at 463-464. “In aggravation, the special master observed that [the lawyer] made a negligent mistake that, if disclosed, would cause him to be denied future work from his client, and that he chose to be dishonest rather than face the consequences of his negligence.” *Id.* at 464.

The Georgia Supreme court concluded that a six month suspension was too lenient, and ordered a twelve month suspension. *Id.* The Court held that in its “view, given the fact that [the lawyer’s] dishonest conduct was perpetrated in connection with a court document, and thereby touched on the integrity of the legal process, a suspension of one year is imperative.” *Id.*


In *Pennington*, a clerk error and failure to keep records sufficient to identify the error ultimately caused a personal injury lawsuit to be subject to dismissal after the statute of limitations passed. The lawyer agreed to a dismissal without consulting with her clients about the error, the statute of limitations, or the dismissal. *Id.* at 646. Rather than inform her clients, the lawyer planned to recommend that they accept $10,000 for their claim, intended to be paid from the lawyer’s personal funds. *Id.* She presented her clients with a document entitled “Statement of Settlement” which appeared to be a settlement of the personal injury claims. *Id.* at 647. The lawyer then tried to negotiate reductions of the client’s medical expenses, writing to the medical providers that reductions would be appropriate because under the terms of the clients’ “settlement”, the client stood to receive little compensation if expenses were not reduced. *Id.*

In the grievance proceeding, the lawyer admitted that she did not inform her clients about what had happened with the case, and that she instead presented them with the fabricated “Settlement Statement” and her own funds. *Id.* at 648. As addressed above, the lawyer was found to have violated several rules of ethics, including Rule 1.4 and 1.7 (as well as those proscribing acts of misrepresentation and dishonesty). *Id.*
The lawyer was disbarred.\textsuperscript{5} \textit{Id}. at 660. The Court rejected the lawyer’s assertions that she was remorseful, finding that “protestations of remorse ring hollow when placed next to her testimony, during cross-examination by Bar Counsel at the evidentiary hearing, that, ‘I don't believe, Ms. [Bar Counsel], that I have told any untruths to the clients. So that's it.’” \textit{Id}. at 661. The court found that the lawyer’s expressions of remorse, if any, were “more in the nature of damage control than of sincere remorse.” \textit{Id}. Notably, the court found that the lawyer’s original mistake involving her failure to detect the error was negligent but not sanctionable misconduct under Rule 1.1 relating to competence or 1.3 relating to diligence. \textit{Id}. at 659.

3. **Cases where admitting error does not mitigate discipline, even when the lawyer arguably does not actively conceal the mistake**

- \textit{Cotton v. Mississippi Bar}, 809 So.2d 582 (Miss. 2000)

In \textit{Cotton}, the lawyer placed $10,000 in settlement funds in his firm’s general operating account and failed to pay the client’s medical provider. \textit{Id}. at 583. The medical provider claimed to have tried to contact the lawyer regarding the unpaid medical bills, but the lawyer told the provider to not “harass” him. \textit{Id}. The client was sued by the medical provider to collect $2,499. \textit{Id}. The client could not get in touch with the lawyer between the time she was summoned and the time she was to appear in court. \textit{Id}. When she appeared, she learned that the lawyer had obtained a continuance (although he had not talked to his client first). \textit{Id}. at 583-584. The lawyer thereafter contacted the client and admitted that “he had not paid her medical bills because he had used the money for other purposes. He said that he applied the money towards an unrelated case and office overhead.” \textit{Id}. The lawyer eventually paid the creditor, and the creditor dismissed the collection action against the client. \textit{Id}. at 584.

The client filed a grievance complaint. \textit{Id}. The lawyer wrote to his client, expressing “his regret over the matter.” \textit{Id}. The lawyer did not properly defend himself in the bar proceedings, and the tribunal determined that the lawyer violated several rules of professional conduct, in failing to abide by his client’s decisions, obtaining continuances without her consent, failing to exercise diligence, failing to keep the client informed, and failing to properly handle funds. \textit{Id}. at 584-585. The tribunal recommended disbarment. \textit{Id}. at 585.

The lawyer appealed to the Mississippi Supreme Court. \textit{Id}. He admitted that “he erred in transferring the settlement money from his escrow account to his general operating account” and admitted that he failed to timely pay the medical provider. \textit{Id}. He alleged, however, that “these things occurred out of simple negligence” and contended that disbarment was too harsh of a penalty. \textit{Id}.  

\textsuperscript{5} To illustrate the varying punishments which may be imposed depending upon the jurisdiction, the lawyer was also brought before grievance proceedings in the District of Columbia. The court in \textit{In re Pennington}, 921 A.2d 135 (D.C. 2007) decided that disbarment was too harsh because the lawyer’s conduct did not involve misappropriation of client funds. The Court there instead imposed a two year suspension from the practice of law in the District of Columbia, recognizing the “important difference between Maryland’s treatment of intentional dishonesty – of no matter what kind – and [the District of Columbia’s] treatment of dishonesty.” \textit{Id}. at 140-141.
The Supreme Court disagreed. It found the lawyer’s mishandling of the settlement funds to be the most serious violation, emphasizing that such conduct is deemed to be the “cardinal sin” for lawyers. *Id.* at 586. In analyzing whether there were any mitigating factors to consider, the Court held that “the fact that he made no attempt to mislead the Bar or this Court, and that he candidly admitted his errors, is also not a mitigating factor in his favor.” *Id.* at 589. The Court determined that the lawyer’s fitness to practice law “became questionable once he converted his client's funds for his own use.” *Id.* It then also criticized the lawyer for his failing to properly defend himself in the grievance proceedings, finding that the lawyer having “made no attempt to defend himself once the Bar filed a formal complaint raises additional concerns regarding his fitness to practice law. If he does not tend to his own legal matters, will he tend to the legal matters of his clients?” *Id.*

A strongly worded dissent criticized the majority for giving any weight to the lawyer having failed to defend himself in the Bar proceedings, which the dissent argued was not an appropriate factor to be considered in misconduct cases. *Id.* at 589. The dissent also stressed that the lawyer “has candidly admitted all of his errors”, which the judge viewed as a mitigating factor warranting a lesser sanction. *See id.* at 589-590. The dissent stressed that it was “not a case of fraud or open and outright deception. Instead, [the lawyer] is only guilty of acts of inadvertence which do not justify disbarment, especially in the absence of prior bar discipline. [The lawyer] willingly admitted that he was negligent in failing to pay the medical care provider in time and freely did so when notice was given.” *Id.* at 590. The dissent posited that the lawyer: “admittedly due to his own negligence, inadvertently failed to pay a bill and did not catch his error for a five-month period. Upon learning of his mistake [the lawyer] rectified the situation. What else did this Court expect [the lawyer] to do? Such actions warrant a suspension, but not disbarment.” *Id.*


In *Sanchez Rodriguez*, the client’s case was set for a hearing on the merits. The judge reset the hearing, personally notifying both parties’ attorneys about the rescheduling in open court. Due to a court administrative error, the case was actually called for hearing on the original date. One lawyer was present, but opposing counsel was not present. The judge presiding over the hearing was different than the judge who had reset the hearing, and the presiding judge was unaware of the error in scheduling or that the case had been rescheduled for a later date.

The appearing lawyer did not inform the judge that the hearing had been rescheduled, and stated that he was ready to proceed. Opposing counsel was fined for failing to appear. The lawyer moved to strike opposing party’s allegations, which the court granted.

A grievance was later filed against the lawyer, in which he claimed that he mistakenly failed to delete the original date from his calendar, thereby explaining why he did not inform the judge of the schedule change at the hearing. The lawyer stated that he had a heavy caseload; “that there was no premeditation or reproachable intent in this unfortunate incident, and that he had made a mistake by not crossing out the date that was set aside”; and that “it was an ‘error by omission, in which no bad faith was intended’.”

The court found the lawyer’s explanation unsatisfactory, and without citing to particular evidence revealing that the lawyer’s explanation was fraudulent, held that the lawyer’s conduct
deserved the court’s “strongest censure. His conduct -- trying to take advantage of administrative errors, leading the court into error, and offending an absent colleague and a defenseless party -- does not help further the cause of justice, the sound practice of the legal profession, or the good administration of the courts.” The court ordered a three month suspension.

- **Attorney Grievance Com’n of Maryland v. Fox**, 417 Md. 504, 11 A.3d 762 (Md. 2010)

In Fox, the lawyer made mistakes in handling certain clients’ automobile accident lawsuit and in handling another client’s UM case. *Id.* at 766-767, 770-772. While some actions amounted to misrepresentations, abandonment of cases, allowing them to languish, and being unresponsive to clients was largely at issue. *See id.* In a grievance proceeding, the lower court found that despite the lawyer’s excuses, he did not properly pursue the cases for his clients. He was found to have violated several rules of professional conduct, including the failure to provide competent services, failure to act with reasonable diligence, failure to abide by his client’s decisions, failure to properly communicate with the clients, effectively abandoning his client’s case without adequately protecting them, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and failing to respond to Bar requests for information. *See id.* at 768-770, 772-775.

The lawyer proffered some alleged evidence in mitigation (health problems, mail delivery problems, a flood in his building, and an insufficient calendaring system). *See id.* at 782-784. He also testified that “he was remorseful, that he felt his conduct reflected adversely both upon himself and the legal profession, and that none of his violations of the Rules were intentional.” *Id.* at 774; *See also id.* at 784.

The lawyer was disbarred. The lower court had rejected the alleged mitigation evidence of remorse, stressing that “[i]t was only during his testimony at the trial in this case that [the lawyer] actually apologized for his actions, and even then, he testified that he still did not believe he had violated any rules in his representation of [the car accident clients]. This Court finds [the lawyer’s] so-called remorse to be merely an attempt to excuse his failure to adequately represent his clients.” *Id.* at 775. To that point, the lawyer argued on appeal that it would be “quite difficult to be remorseful about anything until the conduct is called to your attention.” *Id.* at 784. The Maryland Supreme Court recognized that the statement “may be true in and of itself,” but given the fact that this lawyer had been repeatedly contacted by his clients over the years, “thereby calling attention to his lack of communication—and he repeatedly refused to respond. Accordingly, [the lawyer’s] argument is unpersuasive given his willful and blissful ignorance of his misconduct.” *Id.* The Court ultimately concluded that the lawyer’s “remorse, it appears, ‘is more in the nature of damage control than of sincere remorse’.” *Id.*

4. **Cases rejecting mitigation because the admitted “mistake” amounted to intentional misconduct**


In Lafferty, the lawyer withheld a portion of a settlement for the client’s medical bills, and then failed to pay the bills on time. *Id.* at *1. A grievance was filed, in the course of which, the lawyer admitted that he received funds due to the medical provider and did not pay the provider for several
months. *Id.* at *2.* He claimed that he “inadvertently utilized the funds earmarked for the medical provider, and acknowledged before the committee and this court that it was a ‘mistake’.” *Id.* He apologized for the “technical violation” of the ethical rules regarding handling of client funds. At the hearing, he explained the he had other obligations that he took care of with the funds first, and while he had anticipated other revenues from which he would make the payments such revenues did not materialize until later, at which time he transferred sufficient funds back into the client’s trust account to pay the medical provider. *Id.*

The lawyer contended that if sanctions were to be imposed, the court should consider mitigating factors, including the fact that he was candid and showed remorse for his “inadvertent disbursement of the funds in question.” *Id.* at *3.* The court rejected the lawyer’s claim that his withholding of funds that should have been used to pay the client’s medical providers was “inadvertent” or a “mistake.” *Id.* According to the court, “[i]t clearly was a knowing and intentional act.” *Id.* The court held that the lawyer “acted with a dishonest motive.” *Id.* at *4.* With the presence of other aggravating factors (e.g., he had been reprimanded on three other occasions within the decade), and considering other mitigating factors (a very small sum of money was at issue) the court imposed a six month suspension. *Id.*

- **Attorney Grievance Com’n of Maryland v. Gore,** 380 Md. 455, 845 A.2d 1204 (Md. 2004).

  In *Gore,* a lawyer had a separate business as owner of a restaurant. *Id.* at 1205. In connection with the business, the lawyer failed to file timely sales tax returns and failed to pay taxes to the District of Columbia. *Id.* at 1207. During a subsequent tax department investigation, the lawyer had no explanation for failing to file returns or pay taxes. *Id.* He admitted that he knew the money belonged to the District of Columbia and that his conduct was wrong. *Id.* The lawyer’s conduct was brought before the state Bar, and the lawyer asked the court to mitigate his sanction since the infraction was unrelated to his law practice, he was cooperative, he stipulated to the evidence, and he “admits that he made a terrible business mistake for which he has already been punished.” *Id.* at 1211.

  The court issued an order of disbarment, finding that “[t]hrough his actions, [the lawyer] has demonstrated himself unfit to continue to be authorized to practice law in this State. [The lawyer] placed himself and his business above the law. His willful refusal to file returns or pay sales taxes amounts to intentional misappropriation of funds belonging to the District of Columbia. These actions call into question his honesty and his ability to be entrusted with client or third-party funds. [The lawyer] compounded his misconduct by writing a series of checks drawn on an account that he knew or should have known had insufficient funds to cover the amount debited. We hold that, under the circumstances, the proper sanction is disbarment.” *Id.* at 1214-1215.

- **In re Disciplinary Proceedings Against Krombach,** 286 Wis.2d 589, 707 N.W.2d 146 (Wis. 2005).

  In *Krombach,* the lawyer represented a limited liability company, and dealt primarily with only one of its members, “John M.” *Id.* at 149-153. Over time, the lawyer took liberties with the company’s trust and money market accounts, repeatedly withdrawing funds to pay himself and John M. without the consent of the other members. *Id.* Much of the money withdrawn could not be accounted for or shown to be for lawyer’s services. *Id.* John M. died, and the lawyer subsequently wrote himself a check from the funds, and then backdated the transaction to indicate that he paid John
M. with the funds, by fraudulently altering the check. *Id.* at 152. He then altered another check written to himself to appear that it could have been for fees. He wrote more checks to himself, claiming they were for legal fees, but no invoices were produced. *Id.*

The referee recommended disbarment, placing little weight upon the fact that the lawyer “stipulated to wrongdoing”, “admitted regret”, and expressed “the idea that his mistakes were due to sloppy practices, including his practice to ‘round off’ his legal fees.” *Id.* at 155. The referee found that the lawyer “still has not demonstrated an understanding that what he did was steal from his clients” and at the end of the day, the lawyer thought he owed his clients nothing. According to the referee, “[t]his does not demonstrate an acceptance of responsibility.” *Id.* The referee concluded that “what may have begun as sloppiness and poor judgment eventually became outright theft.” *Id.* The lawyer was disbarred. *Id.* at 159.


In *Menton*, the lawyer handling a debtor’s chapter 13 filings made misrepresentations in documents filed with the court and led his client to believe that the case was dismissed due to typographical errors when in fact, it resulted from attorney error. *See id.* at *1*. In response to the court ordering the attorney to show cause why he should not be disciplined, the attorney admitted his “mistakes” and that he made “completely incorrect” statements in filed documents. *Id.* at *4*. He also admitted that his actions violated court orders, bankruptcy rules, and frustrated the court. *Id.*

The court determined that while the attorney claimed his misrepresentations were mistakes and not intentional, “[i]n this court’s humble opinion, any statement certified by the attorney, presumably as to the accuracy and truthfulness of the statement filed with the court, is, by definition, ‘intentional’.” *Id.* The court also rejected the attorney’s attempt to justify his misstatements on the grounds that he was trying his best to save his clients’ home in the bankruptcy and rectify the business situation that they were in, saying the excuses rang “hollow.” *Id.* Moreover, the court found that “[t]hough [the attorney’s] admissions might appear laudable and disarming, the court gives them little regard. The falsity of the [filed documents] did not come to light by [the attorney] stepping forward, but rather only after the court opened the proverbial pandora’s box by making a record in the original order to show cause, wherein . . . statements [in the filed documents] were clearly contradicted by other evidence.” *Id.*

The court concluded that “[g]iven the serious nature of the violations by this attorney”, the court recommended “a review for disciplinary action including consideration of suspension or disbarment of this attorney from practice in the Northern District of New York.” *Id.* at *5.*


In *Kamb*, the lawyer represented a criminal defendant facing charges for driving under the influence and revocation of her driver’s license. *Id.* at 1093. The lawyer was presented with a plea offer for a lesser charge of first degree negligent driving, and the plea was accepted and approved. *Id.* at 1093-1094. The lawyer, however, did not move to suppress breathalyzer results, which could have prevented a license suspension. *Id.* at 1094.
In a hearing before the department of licensing regarding the suspension, the lawyer represented to the hearing officer that an order had been issued suppressing the breath test as involuntary and for lack of foundation. *Id.* When the hearing officer asked for a copy of the order, the lawyer said he “filed it” with the court, that the order was signed by the judge, and that he “forgot to take a copy”. *Id.* After the hearing, the lawyer obtained the client’s case file from the clerk, and altered the existing order (regarding the plea) by handwriting the following: “BAC suppressed not a knowing & voluntary decision to take test”. *Id.* He returned to the clerk and asked for a copy of the order, which the clerk refused to provide, instead reporting the lawyer’s act of altering the order. *Id.*

The lawyer thereafter spoke with the prosecuting attorney about the incident, and asked that she stipulate to a suppression of the breath test results. *Id.* The prosecutor agreed, but she had not been told that the department of licensing hearing had already occurred or that the lawyer had altered the original court order. *Id.* The lawyer eventually admitted that he “wrote on the court order as a shortcut. He also admitted . . . he had made a mistake and apologized to the court administrator.” *Id.* He claimed that “he did not intend to do anything underhanded”, and was going to take a copy of the altered order to the prosecutor and then the judge for approval. *Id.*

In a grievance proceeding filed against the lawyer, the lawyer asked the court to apply the mitigating factor of “remorse”. *Id.* at 1098. The court declined, finding that his “reasoning away the misconduct does not constitute acknowledgement of misconduct. [Cit] Although [the lawyer] apologized for his actions and admitted he made a mistake, he continues to argue that his most culpable misconduct was the result of negligence, rather than intent. The evidence supports the hearing officer’s conclusion that [the lawyer] has not acknowledged the wrongful nature of his conduct and is not entitled to the mitigating factor of remorse.” *Id.* at 1098-1099.

The court concluded that “[a]fter practicing law in Washington State for more than 20 years, [the lawyer] misrepresented the existence of a court order to a tribunal and then altered a filed court order to conceal his lie. Although we recognize the gravity of displacing someone of his or her profession, we order [the lawyer] disbarred for his misconduct.” *Id.* at 1093.

5. Other considerations

There are other considerations regarding the acknowledgement of lawyer error in grievance proceedings.

First, while a lawyer’s candor about genuine “mistakes” in grievance proceedings may be beneficial, the manner in which the error is communicated is a consideration. In *In re Wall*, 272 Kan. 1298, 38 P.3d 640, 641, 642-643 (Kan. 2002), the lawyer missed a statute of limitations in one case, and in another mishandled his own mother’s estate. In connection with the case involving the missed statute of limitations, the hearing officer found that the lawyer “at all times has admitted that error”, the error was “a mistake caused by how the [lawyer’s] calendar system was maintained”, and “the mistake was not caused by lack of diligence or disregard for a client matter by the” lawyer. *Id.* at 1302-1303. The panel also concluded that “[t]here is no suggestion that the [lawyer] ignored or failed to communicate with [the client], other than by virtue of the mistake that led the [lawyer] to believe he had many months to work on” the case. The hearing panel stressed that “lawyers can make mistakes which may constitute malpractice and subject the attorney to a potential claim for damages without those mistakes constituting a violation of the Kansas Rules of Professional Conduct.” *Id.* at 1303.
The attorney was nevertheless disciplined by way of a public censure. *Id.* at 1304. The lawyer had not only admitted his “mistakes” in handling his clients’ matters, he also “stipulated” that his conduct violated rules of professional conduct, including those addressing diligence, communication and safekeeping of property. *Id.* at 1301. The panel determined that due to the stipulations, it would provide “no opinion” as to whether the panel would have independently found a violation absent the stipulation. *Id.* at 1302-1303.

While the lawyer argued that a private admonition was a more appropriate discipline, the panel imposed public censure, since there was injury to the client (regarding the statute of limitations), and “[i]n addition, [the lawyer’s] admission of his four violations of the [Kansas Rules of Professional Conduct] supports published censure”. *Id.* at 1311. Implicitly, had the lawyer admitted mistakes but stopped short of acknowledging that they violated the rules of professional conduct, the conduct may not have been subjected to any discipline. *See id.*

In *Lewellen v. Supreme Court Committee on Professional Conduct*, 353 Ark. 641, 110 S.W.3d 263, 264-265 (Ark. 2003), the lawyer failed to file a timely appeal. The lawyer filed a motion to reinstate the appeal, and in the motion “admitted to failure to file a timely notice of appeal . . . [An] opinion was issued accepting [the lawyer’s] admission of fault and granting the motion to file a belated appeal.” *Id.* at 265. In connection with a subsequent grievance proceeding, the lawyer wanted the matter to remain private, but the reviewing panel issued a decision imposing a “public warning”, which was upheld by the Supreme Court of Arkansas. *Id.* at 267-268. The Court found several bases for upholding the public warning (e.g., by the attorney requesting a public hearing, “the issue of keeping the matter entirely private is moot”). *Id.* at 268. One consideration, however, was that the lawyer had already made the issue a public affair: in the client’s case in connection with the motion to reinstate the appeal, the published order of the court granting the motion to file a late appeal included a statement that the lawyer had admitted “by motion and affidavit that the appeal was not timely filed due to a mistake on his part.” *Id.* Since the lawyer’s mistake was already a matter of public record, the public nature of the Caution was rendered moot. *Id.*

As noted above, there are other factors (besides candor) considered by courts imposing discipline, and there is the significant matter of the court’s discretion. There are cases in which a lawyer violates ethical or fiduciary obligations, does not admit to anything until placed in a position to have to do so, and for reasons not entirely clear, suffered little consequence.

In *Matter of Mosca*, 686 A.2d 927 (R.I. 1996), for example, the lawyer made mistakes during the course of handling three unrelated real estate transactions. In one, he withheld funds from the proceeds which were supposed to be used for an outstanding water bill, but failed to pay the bill. *Id.* at 928-929. When a complaint was filed with the Bar, the lawyer did not respond to a request for explanation until a petition to compel an answer was filed. *Id.* at 929. He responded by submitting a manufactured letter he purportedly wrote forwarding the funds (no check had actually been forwarded and the letter had not been sent.) *Id.* In a second matter, the lawyer also failed to make timely distributions of funds in a real estate transaction and mishandled the distribution. *Id.* During an investigation by disciplinary counsel, the lawyer falsely stated that he refunded the sums owed to the sellers, but subsequently paid the amount owed. *Id.* In the third matter, the lawyer again withheld sums from a real estate transaction that were to be used for payment of property taxes. A check was drawn to pay the taxes, but was not forwarded or was returned, and the funds remained in the lawyer’s client account. *Id.* After this was discovered, the lawyer did not respond to attempts to contact him.
After a complaint was filed with disciplinary counsel, the lawyer went through the file and found the un-negotiated check for the taxes. *Id.* at 930. “[R]ather than acknowledge that a mistake had been made, he attempted to cover up that mistake by fabricating evidence that he had paid the tax from funds in his escrow account. The [lawyer] procured from his files a canceled check that had been paid to the mortgage holder in an unrelated transaction. He then altered that check to make it appear that he had forwarded payment of those funds to the mortgage holder, along with an explanatory cover letter . . . When confronted with this altered check, [the lawyer] admitted to the disciplinary counsel his attempts at deception. He submitted payment . . . after having been directed to do so by the disciplinary counsel.” *Id.*

The Disciplinary Board recommended that the lawyer be suspended from the practice of law for ninety days, and the Supreme Court agreed with the recommendation. *Id.* at 930. The Court found that the lawyer’s initial “failure to handle his client funds properly was the result of inadvertence rather than intentional misconduct” pointing to the fact that the lawyer was “an unseasoned attorney” who was handling a large number of transactions, making numerous deposits and disbursements through client accounts, without adequate policies and procedures in place. *Id.*

The Court found the lawyer’s conduct after being confronted with disciplinary complaints to be the “most egregious.” *Id.* The lawyer’s conduct included deception and/or failure to respond the Office of the Disciplinary Counsel, and attempts to mislead clients, and disciplinary counsel by fabricating an altered check to induce the parties to believe that the taxes had been paid. *Id.* The court concurred with the recommendation of the Board and ordered a ninety day suspension, along with him being placed under supervision for one year after readmission. *Id.*

**H. The Admission of Error May Result in Referral To The Disciplinary Authority**

A Lawyer may admit a mistake in the course of representing a client in an effort to facilitate a favorable outcome for the client in a particular matter or issue. Sometimes this is done to correct minor defects in the case (e.g., failing to file a brief on time), and sometimes for significant errors (e.g., alleged ineffective assistance of counsel).

Admitting a mistake in the context of ongoing litigation does not necessarily free the client from suffering as a result of the error. In *U.S. ex rel. Osborne v. Homecare Products, Inc.*, No. SA-06-CV-0746, 2008 WL 2267222, *1* (W.D. Tex. May 29, 2008), for example, the lawyer did not timely file a response to a motion for summary judgment. The court denied a request to submit a late response for lack of excusable neglect. *Id.* at *1*-2. The court found that the lawyer “admits that the mistake in failing to seek leave to a file late response is his mistake, not his client's mistake. [The client], however, chose the ‘attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.’ There is no excuse for failing to familiarize oneself with the rules for the district in which one files a lawsuit or failing to ascertain the status of one's case.” *Id.* at *2*.

In other contexts, admitting a mistake can help the client, although the admission may result in referral to the state Bar for disciplinary action. In *McGrew v. State*, 333 Ark. 207, 966 S.W.2d 266 (Ark. 1998), for example, the lawyer admitted in a “motion for rule” that the record for the appeal was tendered late due to a mistake on the lawyer’s part. *Id.* at 207. The court found that “such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion”, and the
motion was granted. *Id.* A copy of the opinion, however, was forwarded to the state Bar’s Committee on Professional Conduct. *Id.* The same occurred in *Clemons v. State*, 278 Ark. 160, 644 S.W.2d 272 (Ark. 1983), where the lawyer filed a notice of appeal but did not timely file the record. The court held that the lawyer “admitted that the late filing of the record was a mistake on his part. The error is good cause to grant the motion for a rule on the Clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct.” *Id.* at 160.

I. Insurance Coverage Considerations In Admitting Error

Lawyer’s Professional Liability policies are generally claims-made policies, and the question arises whether a lawyer has a contractual obligation to report to the carrier a mistake before a claim is made when he or she discloses the mistake to the client. As one state’s ethics committee reasoned, when faced with the ethical and fiduciary obligation to admit a mistake to the client:

The lawyer should also consider the impact of disclosure of the error to the client on the lawyer’s malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and ‘cooperation clauses’ in the lawyer’s policy.

Colorado Bar Association Ethics Committee, Formal Ethics Opinion 113 (November 19, 2005).

Under some circumstances, a lawyer who fails to report a mistake to his or her professional liability insurer risks jeopardizing coverage, and may face rescission of the insurance policy itself. On the other hand, a lawyer who admits a mistake to the client faces a potential argument by the insurer (however weak) that the lawyer failed to comply with typical policy wording proscribing the insured from admitting any liability without the carrier’s consent.

Some issues arising in the case law are addressed below.

1. Application for Insurance/ Possibility of Rescission

Because insurance is provided for claims made during the policy period, insurers are especially interested in whether a prospective insured is aware of facts or has a reason to believe that circumstances already exist that may lead to a claim. A question on this point is contained in the application. As with any insurance application, the applicant is obliged to answer truthfully, and the failure to answer truthfully or to disclose a material matter will affect coverage. The consequence of failing to answer truthfully is that there is no coverage for the particular claim . . . or, more drastically, the insurer may sue for misrepresentation . . . and seek to have the policy rescinded, reformed, or declared void. The usual test for determining misrepresentation is the objective or “reasonable” person test . . ., though some courts have used a mixed test.

(citations and footnotes deleted.) Harold A. Weston, J.D., *Lawyers’ Professional Liability Insurance*, 92 A.L.R.5th 273, §2[a] (2001); See also Richard D. Hoffman, *TELL-ALL POLICY: Bad Things Can Happen if You Don’t Keep Your Carrier Informed*, ABA Journal (March 2003)(“[M]ost policies are issued pursuant to written applications that ask whether the insured is aware of any claims or any fact, circumstance or situation that might give rise to a claim . . . If a reasonable attorney would have
understood a circumstance or potential claim existed, coverage can be denied or the policy can, in appropriate circumstances, be rescinded").

In *Home Indem. Co. Manchester, New Hampshire v. Toombs*, 910 F. Supp. 1569, 1570-1571 (N.D. Ga. 1995), for example, the lawyer represented the client in an action against the client’s employer after the client was injured in a railroad accident. The lawyer voluntarily dismissed the action in one court, and filed three days later in another, asserting claims under the Federal Employers Liability Act. *Id.* at 1571. However, the three year statute of limitations for FELA actions had just lapsed. *Id.* Summary judgment was granted in the later filed action due to the expiration of the statute of limitations. *Id.* In the summary judgment order, entered in July 1992, the court noted that the client’s “error in dismissing [the earlier action in the other court], while unfortunate, does not present the type of extraordinary situation for which equitable tolling is preserved.” *Id.* The court also found that Georgia’s renewal statute did not apply to FELA actions. *Id.* A notice of appeal was filed. *Id.*

While the appeal was pending, the lawyer submitted an application for professional liability insurance. *Id.* at 1571. The application asked if the lawyer knew of acts or omissions “that could result in a professional liability claim against any attorney of the firm, the firm or its predecessors?” The lawyer responded: “NO.” The subsequently issued policy contained a prior acts exclusion. *Id.*

After inception of the policy, the court of appeals affirmed the lower court order, and the Supreme Court of Georgia denied a writ of certiorari. *Id.* Thereafter, the lawyer submitted a renewal application for insurance. *Id.* at 1572. The application asked if the lawyer was aware of any act or omission in the past year “which might reasonably be expected to be the basis of a claim or suit, arising out of the performance of professional services for others.” To which the lawyer responded: “NO”. *Id.* The lawyer was offered a policy with or without the prior acts exclusion (for a higher premium), and the lawyer chose the policy without the prior acts exclusion. *Id.*

A few days after paying his premium, the lawyer filed a petition for a writ of certiorari with the United States Supreme Court for his client’s case. *Id.* Five months later, the lawyer notified the insurer that a claim was being made against him by the client. *Id.* The insurer tendered a return of the lawyer’s premium, and sought rescission based upon material misrepresentations in the original and renewal applications for coverage. *Id.*

In a subsequent rescission and declaratory judgment action, the lawyer argued that at the time of his applications, he had no reason to believe the client would pursue a claim. *Id.* at 1573-1574. The court rejected the argument, finding that at the time of the first application, the underlying court had already held that the client’s claim was barred by the statute of limitations, specifically stating in the order that the voluntary dismissal of the earlier case was an “error.” *Id.* at 1574. And at the time of the second application, when the lawyer again checked “no” to questions about claims, the Georgia Court of Appeals had affirmed the trial court’s order against the client, and the Georgia Supreme Court had denied certiorari. *Id.*

The insured unsuccessfully argued that:

To say that [the lawyer] did have reason to believe that a claim would result from the circumstances of the FELA case, or that he should have interpreted the question to require disclosure of the status of [his client’s] suit, implies that in every case where an
attorney suffers an adverse ruling, he must report those circumstances to his liability carrier as a circumstance that could potentially lead to a claim. This would be an absurd result.

*Id.* at 1575. To that argument the court replied that it “agrees that requiring an attorney to disclose on his application for professional liability insurance every adverse ruling would be unreasonable” and it contemplated that in some cases there would be fact issues. *Id.* It nevertheless found that the facts at hand were “so clear—namely, that the only reason [the client’s] case was lost on summary judgment was because of [the lawyer’s] decision to voluntarily dismiss the case. Thus, in these circumstances, the Court does not find it unreasonable to expect an attorney to disclose the fact that he chose to voluntarily dismiss a client’s viable action, refile it in another court, and, as result of that choice, lost the case because the second action was barred by the statute of limitations.” *Id.*

The court also noted that the lawyer had admitted to the client that he made a mistake in voluntarily dismissing the prior action when the statute of limitations motion was filed in the later action in the other court. *Id.* at 1579. That evidence, along with other admissions and evidence, led the court to conclude that at the time the lawyer completed the applications, his statements were untrue and fraudulent, warranting rescission. *Id.* at 1579-1580.

A lawyer’s failure to admit a mistake on an insurance application could potentially have the effect of leading to rescission of the policy for the entire law firm, even as to those lawyers who knew nothing about the potential claim or misrepresentation made in this application. *See American Guarantee & Liability Ins. Co. v. Jaques Admiralty Law Firm*, 121 Fed.Appx. 573 (6th Cir. (Mich.) 2005) (“The prevailing rule, however, is that a misrepresentation by an insured in an application for insurance permits rescission even as to innocent insureds”), *citing Home Ins. Co. v. Dunn*, 963 F.2d 1023, 1026 (7th Cir. 1992) (“The very fact of a material misrepresentation voids the policy. Though the other attorneys did not intend to deceive, the falsehood on the application is fatal. [The lawyer’s] misrepresentation caused [the insurer] to issue a policy to all the attorneys that otherwise would not have been forthcoming”).

In *Illinois State Bar Ass'n Mut. Ins. Co. v. Law Office of Tuzzolino and Terpinas*, 2015 IL 117,096, --- N.E.3d ---- (Ill. Feb 20, 2015) (NO. 117096), a lawyer in a law firm mishandled his client’s case in several regards, and lied to his client about the status of certain matters. Upon learning that one matter had been dismissed, the client confronted the lawyer (in February 2008), and the lawyer offered to pay (but did not pay) the client $670,000 to settle any potential malpractice claim. *February 20, 2015 Order*, at ¶4. In April 2008, the lawyer completed a renewal application for his firm’s insurance policy. *Id.* at ¶5. He answered “no” to the question of whether any member of the firm was aware of acts or omissions “which may give rise to a claim”. *Id.* The policy was issued, effective May 1, 2008. *Id.*

Another lawyer in the firm learned of the malpractice one month after issuance of the policy, and he reported the matter to the insurer. *Id.* at ¶6. The insurer brought suit to rescind the policy. *Id.* at ¶7. The misrepresenting lawyer agreed to an entry of judgment against him, and the trial court held that the insurer also had no duty to defend the other lawyer or the firm. *Id.* at ¶¶ 8-9. The other lawyer appealed, arguing that he was entitled to coverage pursuant to an “innocent insured clause” and the common law “innocent insured doctrine”. *Id.* at ¶¶10. The court of appeals agreed with the lawyer’s position regarding the common law “innocent insured doctrine”. *Id.*
The Illinois Supreme Court reversed, finding that, although the “innocent insured doctrine” may apply to bar application of a policy exclusion or condition to an innocent insured, the doctrine did not apply to rescission based upon a misrepresentation made to procure coverage. *Id.* at ¶ 24-32. Finding that the doctrine “makes sense” in the context of applying policy exclusions and conditions because the innocence of the insured is relevant to whether an intentional act occurred, it is irrelevant in the rescission context because in Illinois, rescission was available even for innocent misrepresentation. *Id.* at ¶24; See also ¶30. Pursuant to the particular statute allowing for rescission in Illinois, the insurer may be entitled to rescission where there is “a material misrepresentation which affects either the acceptance of the risk or the hazard to be assumed. . . .” *Id.* at ¶17. Finding that “recission of an insurance policy because of a misrepresentation on the application is distinctly different from the denial of insurance coverage because of excluded wrongdoing. This is a ‘subtle, but important’ distinction . . .in that excluded conduct might bar coverage for a claim arising from that conduct, but a misrepresentation in the application broadly affects the validity of the policy as a whole.” *Id.* at ¶25. Stressing that “[a] misrepresentation on the policy application goes to the formation of the contract” (¶31), the Court held that the rescission applied not only to the lawyer who filled out the application, but also applied to the other lawyers in the firm. *Id.* at ¶41. See also *American Guarantee & Liability Ins. Co. v. Jaques Admiralty Law Firm*, 121 Fed.Appx. 573 (6th Cir. Mich.) 2005(citations omitted.) (“While we sympathize with the innocent insureds' position, and recognize that innocent employees are likely to suffer if the entire policy is voidable because of one man's fraudulent response, it must be recognized that plaintiff insurers are likewise innocent parties’. . . . Moreover, '[t]here is no reason why the parties could not have negotiated a contract expressly providing the kind of protection to ‘innocent’ insureds that [the Firm] ask[s] this court to impute to the agreement’”).

Jurisdictions differ as to whether a subjective test or objective standard determines whether there has been a misrepresentation on an insurance application sufficient to warrant rescission. *Compare Home Indem. Co. v. Manchester, New Hampshire v. Toombs*, 910 F. Supp. 1569, 1570-1571 (N.D. Ga. 1995)(applying an objective standard in finding that the lawyer’s answers on the application were objectively false), *with Liebling v. Garden State Indem.*, 337 N.J.Super. 447, 767 A.2d 515 (N.J. Super. A.D. 2001)(citing authority for the proposition that since the application question is subjective, the lawyer must subjectively know the answer is false in order to be subject to rescission). One court identified some of the policy considerations in this regard, recognizing that application questions:

Impose[] a substantial burden on the attorney with respect to his recollection and, depending on the circumstances, his judgment as to whether his conduct may result in a malpractice claim. On the other hand, from the insurer’s point of view, an accurate answer is important to its assessment of the risk. The insurer would like to avoid coverage when an attorney applies for a policy because he knows that a malpractice claim is likely to be filed and when a reasonable attorney would have so concluded. Although the balancing of these interests has not been specifically addressed [in New Jersey] it is clear that since the question was subjective the answer is to be judged on the attorney’s state of mind. If he honestly believed that a malpractice claim was unlikely, his negative answer to the question posed in this case is not a misrepresentation.

Regardless of the standard employed, with respect to the possibility of rescission, one commentator noted:

Attorneys who believe this couldn’t happen to them because the same carrier insured them for years shouldn’t be so sanguine. Policies are still annual, and renewal applications still ask about prior knowledge. What is the solution? Candor and disclosure coupled with a dose of common sense. Notifying one’s carrier of a potential claim generally will guarantee coverage. Thus, reporting everything to the carrier probably is the only surefire way to avoid sleepless nights and readjustment of one’s retirement portfolio. Reality, however, requires some vetting to determine whether the potential for a claim actually exists. Claims and potential claims affect premiums, and it would be foolhardy and expensive to report each instance when someone reacts to a litigation tactic or questions the meaning of a document. When in doubt, a concerned lawyer should consider consulting with a colleague for an impartial read on credibility of the threat.


2. Prior Knowledge Exclusion

Aside from rescission, not notifying an insurance carrier of a professional error potentially implicates prior knowledge provisions/exclusions common in professional liability policies. Some policies include a policy Condition, affording coverage only if prior to inception, no insured had a reasonable basis to believe that the insured committed malpractice or to foresee that a claim would be made. Others contain an exclusionary provision, stating that coverage is barred if, prior to inception, any insured knew or could have reasonably foreseen that an act or omission might be expected to be the basis of a claim. Some reported cases addressing these provisions follow:


In Toombs, supra, the court agreed to rescind a policy, but also discussed an alternative argument by the insurer that the lawyer failed to comply with a policy provision stating that coverage applied if the act or omission happened before the policy period, and the insured “had no reasonable basis to believe that the insured had breached a professional duty or to foresee that a claim would be made against the insured.” *Id.* at 1579. The court concluded that the lawyer “did have a reasonable basis to believe that he had breached a duty” since the trial court had “expressly referred to his actions as an ‘error’,” and at the time of renewal the lawyer’s “only hope of reversal lay with the slim possibility that the United States Supreme Court would grant certiorari.” *Id.* The Court also concluded that the lawyer had a reasonable basis to believe that he would be sued, by virtue of certain admissions about his conduct. *Id.*

In Ettinger, a law firm represented clients in a lawsuit against their realtors over alleged misrepresentations concerning certain property. Id. at 450. The realtors asserted that the claim was frivolous and warned the lawyer his clients would be sued for fraud and malicious prosecution. Id. The lawsuit was dismissed, and the realtors sued the client and the lawyer for alleged wrongful abuse of proceedings under a Pennsylvania statute. Id. at 451. The realtors alleged that the lawyer knew the filings were wrongful and encouraged his clients to pursue the claims even when forewarned of the consequences. Id. The lawyer represented himself as well as the clients against the realtors’ claim, saying there was no conflict of interest. Id.

Two years later, the clients fired the lawyer and advised that they would be filing a claim for malpractice. Id. The lawyer placed his carrier on notice, and a few months later the clients filed a malpractice action. Id. at 1579.

The Policy contained a “prior knowledge” exclusion providing that insurance did not apply to any claim arising out of an act or omission occurring prior to the inception date “if any insured prior to the inception date knew or could have reasonably foreseen that such negligent act, error, omission or personal injury might be expected to be the basis of a claim.” Id. at 451-452. The insurer contended that the provision barred coverage because the realtors’ lawsuit - which commenced prior to inception - “would have put a reasonable lawyer on notice that his acts, errors, or omissions in the Realtor Action might be the basis of a future malpractice action.” Id. at 452. The lawyer contended, however, that he could not have reasonably foreseen that the realtors’ action might be the basis of a future malpractice claim against him. Id. at 453. The lawyer pointed to the fact that the clients “begged and repeatedly required” the lawyer to represent them in the realtor claim, rendering the lawyer unable to foresee that they would later sue him. Id. The court disagreed, finding an absence of coverage based upon the prior knowledge provision, concluding that “a reasonable attorney would know that the filing of” the realtor’s action “against himself and his client constitutes an allegation of professional negligence for purposes of the prior knowledge exclusion of the attorney’s professional liability policy.” Id. at 454-455.


In Mirsky, lawyers represented a client in a medical malpractice action. Id. at *1. Due to discovery violations by the lawyers, the court in October 1997 barred the client’s expert from testifying, preventing the client from overcoming a motion for summary judgment, which was granted in September 1998. Id. No claim was made by the client at that time.

After the summary judgment was granted, the lawyers renewed their policy, but did not report a potential claim to the carrier. Id. The policy excluded coverage for claims based on acts or omissions occurring before inception if any insured knew or could have reasonably foreseen that such acts or omissions might be the basis of a claim. Id. During the policy period, the client notified the lawyers that she was suing them for legal malpractice, and the lawyers notified the insurer. Id.

The insurer filed a declaratory judgment action seeking a determination that it owed no coverage to the lawyers. Id. The district court found an absence of coverage and the Court of Appeals affirmed. In sum, the Court found that the lawyers “should have reasonably known of [the client’s] potential claim by” the date summary judgment was granted against the client, or by the date the
appeal was filed, which both predated inception of the policies under which the lawyers sought coverage. \textit{Id.} at *2.


In \textit{Lilley}, the client obtained a verdict for $1.5 million in a wrongful death case in September 2000, but the verdict form indicated that the decedent was comparatively negligent and reduced the award to $32,000. \textit{Id.} at 168. The lawyers thought that the verdict had been reduced by $32,000, not to $32,000, and failed to request that the jury be polled. \textit{Id.} Although arguing for the reduction after trial, the judgment on the verdict was entered in the amount of $32,000 for the wrongful death award. \textit{Id.} The client was subsequently granted a new trial, and on retrial in May 2001, the jury found the defendants not negligent. \textit{Id.} After an appeal, the second verdict was upheld in March 2002. \textit{Id.} at 169.

In May 2002, the lawyer received notice that the client intended to file a claim for malpractice, and the lawyer put his insurer on notice that day. \textit{Id.} In June 2002, the client served written notice of her claim. \textit{Id.} The lawyer had been issued policies by the same insurer for several years. \textit{Id.} at 167-168. The 2002-2003 policy under which the claim had been made excluded coverage for acts or omissions occurring prior to the effective date if any insured knew or could have reasonably foreseen that such acts or omissions might be the basis of a claim. \textit{Id.} at 171.

The court held that the exclusion did not apply to bar coverage for the lawyers. \textit{Id.} at 171-172.

By its terms, whether the exclusion applies turns directly on the facts known to the [lawyers] prior to the effective date of the policy. Based on those facts, the Court must decide whether a reasonable attorney in possession of such knowledge would reasonably foresee that a malpractice claim might be forthcoming. This test incorporates both subjective and objective elements. Whether the [lawyers] could have reasonably foreseen [the client’s] malpractice claim is an objective test that can be determined as a matter of law, but it must be determined based only on those facts and circumstances that the [lawyers] were subjectively aware of.

\textit{Id.} at 171. The court found that this standard was not satisfied in the particular case where, what the lawyers knew was that they were representing their client “in a very difficult case that was fraught with serious legal issues.” \textit{Id.} at 172. The court rejected the insurer’s reasoning that: “A claim by [the client] was reasonably foreseeable. She had a million dollar verdict ‘taken away’ from her. Where else would she go to seek compensation for the death of her husband, other than a legal malpractice claim against her former lawyers?” \textit{Id.} at 172. The court found that “[a]lthough any ‘act or omission’ by an attorney that did not result in a hugely favorable outcome to the client ‘might’ lead a client to make a claim and ‘foreseeability’ is a virtually limitless concept, the touchstone here is reasonableness, not conceivability.” \textit{Id.} The court did not find it reasonably foreseeable that the client would assert a claim for malpractice, before she did. \textit{Id.} at 173. In this regard, the court stressed that after the first trial, the client’s claim appeared to remain viable, there was a considerable offer of judgment by the defendants before the second trial, the client continued to retain them to represent her, and never demonstrated dissatisfaction with the lawyers. \textit{Id.} In the court’s opinion and in light of the circumstances, “a reasonable attorney would not reasonably foresee that [the client] would make a
claim prior to the ultimate unfavorable entry of judgment against all of [the client’s] claims after the appeal.” *Id.*

3. **Notice Provision**

“There is obviously no ethical duty to inform one’s malpractice carrier of a serious error, but almost every malpractice policy carries a clause requiring prompt notification to the carrier of any event that may give rise to a claim. Failure to abide by such a clause can, and sometimes does, result in denial of coverage.” Timothy J. Pierce & Sally E. Anderson, *What To Do After Making A Serious Error*, Wisconsin Lawyer, 83-FEB Wis. Law. 6, 8 (February 2010); See also Brian Pollock, *Second Chance Surviving A Screwup*, 34 No. 2 Litigation 19, 24 (Winter 2008)(“No one wants to face a malpractice suit, but most of us are at least protected from direct liability by professional liability insurance coverage. But a lawyer who does not properly report her mistake to the carrier faces the prospect of losing that protection”).

Professional liability insurance policies typically include provisions requiring the lawyer to notify the insurer as soon as practicable when the lawyer becomes aware of acts or omissions which could reasonably be expected to become the basis of a claim against the lawyer for malpractice. See Benjamin P. Cooper, *The Lawyer’s Duty To Inform His Client Of His Own Malpractice*, 61 BLRLR 174, Baylor Law Review (Winter 2009). Such notice provisions have been found to serve “several purposes”; it enables insurers to make timely investigations and exercise early control over a claim (which could lead to a beneficial settlement); it enables “insurers to take steps to eliminate the risk of similar occurrences in the future”; insurers who receive timely notice “can establish more accurate renewal premiums and maintain adequate reserves”; “particularly in a legal malpractice insurance context [the provisions] allow carriers to become involved in determining, and possibly assisting in, any appropriate efforts to mitigate or remediate the errors of their insureds.” *Sirignano v. Chicago Ins. Co.*, 192 F. Supp. 2d 199, 203 (S.D.N.Y. 2002).

In *Sirignano*, the lawyer represented a client in a medical malpractice action. The matter was scheduled for trial and both parties represented that they were ready for trial when it was called. *Id.* at 201. The judge, however, removed the case from the calendar due to the client’s failure to provide the opponent with expert reports. *Id.*. Fifteen months passed, the defendant moved to dismiss the case as abandoned, and the court granted the motion in January 1999. *Id.*. The lawyer moved to vacate the judgment, but the motion was denied in April 1999. *Id.*. In denying the motion to vacate, the trial court found that the motion was procedurally defective because the lawyer failed to submit a sworn statement from an expert regarding the merits and a statement that he did not intend to abandon the case. *Id.* at 204. The court directed the lawyer to pay costs. *Id.*

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6 Policies could contain differing notice provisions. Some require notice after a claim is made, or when there is a “potential claim”, or after a “wrongful act” has occurred. Some tie the notice into the reporting requirement, by providing that a claim (subject to reporting) is deemed “made” when the lawyers “first receive information or have knowledge of specific circumstances involving a particular person or entity which could reasonably be expected to result in a claim.” See, e.g., *Professionals Direct Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co.*, LPA, No. 2:06–CV–240, 2009 WL 4281263 (S.D. Ohio November 24, 2009).
The lawyer appealed to the Appellate Division, which affirmed the dismissal in January 2000. The lawyer then moved for leave to appeal to the New York Court of Appeals in the fall of 2000, but the motion was denied. *Id.* at 201. “Shortly thereafter” (in October 2000), the lawyer notified his professional liability carrier that the client might assert a claim, while stating that the client had not given the lawyer any such indication. *Id.* at 202. Four months later, the insurer asked to review the underlying file, and a few days after that, the client’s new lawyers wrote to the original lawyer about a possible malpractice claim. *Id.* The lawyer forwarded the file to the insurer a week later, and one month thereafter the insurer denied coverage for the alleged failure to provide timely notice. *Id.*

The policy at issue contained an “assistance and cooperation” clause, which required the insured to provide notice as soon as practicable upon becoming aware of any acts or omissions that “could reasonably be expected to be the basis of a Claim”. *Id.* at 202. The court held that the insurer owed no coverage obligation because the lawyer did not provide notice of the potential claim until October 2000, which was “approximately 18–22 months after he learned of it.” *Id.* at 202-203. The court found that “it could not be any clearer that [the lawyer] failed timely to advise [the insurer] of a potential claim. The case [the lawyer] was handling for [the client], which [the lawyer] believed to have merit, was dismissed as abandoned in January 1999 because [the lawyer] had done nothing to restore the case to the calendar within the 1–year period allowed by [the rules]. [The lawyer’s] knowledge of that dismissal was alone sufficient to create the reasonable expectation of a malpractice claim.” *Id.* at 204.

The court found that even if the dismissal did not give rise to a reasonable expectation that a claim would be made, it became apparent when the court denied the motion to vacate based upon a procedural defect of the lawyer’s making, and in which the court directed the lawyer to pay costs. *Id.* at 204. The court concluded:

In short, under any objective view of the facts, there were a series of errors by [the lawyer], each of which was clearly brought to his attention from the beginning to the middle of 1999, and all of which compromised his client's right to recover. It is hard to imagine what more, short of the filing of a complaint by the client, would be necessary to trigger the policy's notice of occurrence requirement. Indeed, to hold the foregoing facts insufficient would render the notice clause meaningless; and it is hornbook law that an insurance policy cannot be construed so as to render its terms meaningless or of no effect.

*Id.* The court rejected the argument by the lawyer that he should have been allowed to let the appeal (i.e. the “remediation process”) run its course before having to notify the insurer. *Id.* at 205. To that argument, the court stressed that the “lawyer is not permitted to await the outcome of an appeal he was prosecuting on behalf of the client before giving notice to his carrier, when he became aware of a potential malpractice claim . . . months earlier.” *Id.* It continued that “the fact that an insured lawyer continues to represent the client in a pending matter, and that the courts have not finally spoken on the case, does not eliminate his notice responsibility to his carrier.” *Id.*

In contrast, in *Shaheen, Cappiello, Stein & Gordan, P.A. v. The Home Insurance Company*, 143 N.H. 35, 719 A.2d 562 (N.H.1998), the court found coverage afforded in a case in which the lawyer did not provide the insurer notice until a year and a half after first identifying a mistake.
The lawyer and his firm represented the client in connection with a prenuptial agreement. *Id.* at 564. A provision in the draft agreement providing for a distribution of certain property was inexplicably omitted from the final document. *Id.* Six years later, the client sought legal advice from a different lawyer from the same law firm. *Id.* In April 1991, the new lawyer wrote a memorandum to the original lawyer which opined that “the prenuptial agreement actually signed does not cover the dissolution of jointly-held property....” *Id.* The two lawyers exchanged memoranda regarding the omitted provision. *Id.* The new lawyer discussed options with the client in light of the omission. *Id.* The client allegedly “expressed confidence” in the new lawyer’s abilities, and approved of the firm’s continued representation of her in the divorce action. *Id.*

In November 1991, the law firm applied for renewal coverage with its insurer. *Id.* The firm did not disclose the client’s matter in response to the application question as to whether any lawyer was aware of acts or omissions that might “reasonably be expected to be the basis of a claim...” *Id.*

In August 1992 the court in the divorce proceeding indicated that because the agreement was silent regarding disposition of the marital home, the matter would likely be disposed of under equitable principles. *Id.* At this time, the lawyer told the client that she would have a potential malpractice claim against the law firm if the master ruled as indicated. *Id.* In a memorandum, the new lawyer asked the original lawyer to obtain a copy of the current malpractice policy to determine if they needed to place the carrier on notice of a potential claim. *Id.*

The following month, the master concluded that the prenuptial agreement did not cover the disposition of the marital home. *Id.* A month later, the new lawyer informed the malpractice carrier about the potential claim, “approximately eighteen months after [the law firm] first learned of the potential problem.” *Id.* The insurer reserved its rights, and ultimately closed its file in late 1993, since no claim had been made. *Id.*

The law firm was ultimately sued, and the insurer denied coverage, claiming that the October 1992 notice was untimely. *Id.* at 564-565. The notice provision in the policy provided that notice was required as soon as practicable after the insured became aware of acts or omissions “which would reasonably be expected to be the basis of a claim or suit.” *Id.* at 565.

The trial court held that the lawyers were entitled to coverage, finding that it was “only when [the second lawyer’s arguments] failed did damages emanating from [the original lawyer’s] oversight become a real issue, for if [the second lawyer] had prevailed on [his] argument[s], there would have been no reasonable likelihood of a claim.” *Id.* at 566. The Supreme Court affirmed. It cited with approval the reasoning of one commentator, who states that:

The test, however, is one of reasonableness: is it more likely than not that an incident will lead to a claim? Certain circumstances are clear-cut, as in the cases of blown statutes of limitations or the late filing of a Subchapter Selection. Most cases are less clear-cut, however, and require that the attorney exercise his professional judgment in evaluating the possibility that an adverse development will give rise to a claim.

The Court concluded that the provision requiring notice of incidents that “could ‘reasonably be expected’ to form the basis of a claim or suit is ambiguous.” *Id.* at 566. It found that “[a]s drafted, the provision does not indicate whether notice to the insurer is required when all elements of a malpractice claim are present, or when, based on the parties and the circumstances, a malpractice claim on the merits is likely. Therefore, we apply the latter view, interpreting it in favor of providing coverage to the insured.” *Id.* The Court agreed with the trial court’s determination that the lawyers had acted reasonably in not reporting the incident earlier. *Id.* at 567. “If [the insurer] wishes to require reporting in every instance of an actual or a potential claim in order to guarantee coverage, it must use clear policy language to do so.” *Id.*; See also Professionals Direct Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., LPA, No. 2:06–CV–240, 2009 WL 4281263 (S.D. Ohio November 24, 2009)(citing Shaheen with approval for the proposition that the term “reasonably be expected” is ambiguous and should be construed in the insured’s favor).

As in the case of considering alleged misrepresentations in insurance applications, courts have also considered in the notice context whether the lawyer’s subjective understanding of the likelihood of a claim is controlling, or whether a lawyer has the duty to report anything that a reasonable person, under an objective standard, would regard as likely to form the basis of a claim. *See* Mark Hansen, *When The Case Lays an Egg: In the event of an error, it may pay to let the client -- and the insurer -- in on it*, ABA Journal (March 2000).

Finally, one commentator suggests that the notice provision in lawyer’s professional liability policies may be a “helpful guidepost for the lawyer in determining” whether to admit mistakes to clients. “Once the lawyer has decided to put his malpractice carrier on notice of a possible claim then reporting to the client is a necessity. . . If a lawyer becomes aware of an act, error or omission which could reasonably be expected to be the basis of a legal malpractice claim, then the next call must be to the client.” Benjamin P. Cooper, *The Lawyer’s Duty To Inform His Client Of His Own Malpractice*, 61 BLRLR 174, 198, Baylor Law Review (Winter 2009).

### 4. Voluntary Payments Provision

Some policies include a Condition prohibiting the lawyer from making voluntary payments or admissions of liability. The issue arises whether a lawyer’s admission made in an effort to comply with his or her ethical obligations and fiduciary responsibilities to the client could be the basis for a disclaimer of coverage.

In *Illinois State Bar Ass’n Mut. Ins. Co. v. Frank M. Greenfield and Associates, P.C.*, 980 N.E.2d 1120, 1121 (Ill. App. 2012), the lawyer admitted to having made a mistake in drafting a client’s will. The mistake resulted in beneficiaries receiving less money than they would otherwise have received. *Id.* In a letter sent to the beneficiaries after the client’s death, the lawyer admitted that when he drafted the will, he “inadvertently omitted a provision that had been contained in” a previous will (due to a computer generated version of the document), and admitted that “it was an oversight.” *Id.* at 1123.

The lawyer and his firm were sued for malpractice, and his insurer disclaimed on the grounds that the lawyer violated the voluntary payments clause that provided that: “The INSURED, except at its own cost, will not admit any liability, assume any obligation, incur any expense, make any payment, or settle any CLAIM, without the COMPANY’S prior written consent.” *Id.* at 1122.
In response to an argument that the lawyer had an ethical obligation to disclose his mistake, the insurer argued that the lawyer’s “letter went further than merely relating facts.” *Id.* at 1124. The trial court found that the lawyer was entitled to coverage, in part based on its finding that the lawyer had only admitted facts and not liability, that “[t]he fact that his statements supplied the heirs with what they might need to prove malpractice in the underlying suit does not automatically render him in violation of the ‘Voluntary Payments’ provision of the insurance policy”, and that “any limitation on an attorney’s ethical duty to disclose raises public policy considerations.” *Id.* at 1125.

The court of appeals affirmed, finding that the voluntary payments provision was not enforceable in the presented context. *Id.* at 1127-1128. Both parties acknowledged that the lawyer “had a duty to disclose his mistake to the beneficiaries.” *Id.* at 1127. The insurer argued, however, that the lawyer “went beyond his ethical obligation, since ‘he was not obliged to admit to the elements of a legal-malpractice action, as his letter did—certainly not before contacting his liability insurer to notify it of a possible claim for which the insurer might be responsible, and seek its advice in handling that delicate situation’.” *Id.* The court disagreed.

The insurer contended that “it would not have interfered with [the lawyer’s] discharge of his professional duties, but argues that it ‘would certainly have played a role in his disclosure of his error and its consequences, even if only by advising [the lawyer] in how to fulfill his ethical obligations in a way that would not compromise his defense to a malpractice case’.” *Id.* at 1128. To this argument, the court concluded:

[W]e are uncomfortable with the idea of an insurance company advising an attorney of his ethical obligation to his clients, especially since, as in the case at bar, the insurance company may advise the attorney to disclose less information than the attorney would otherwise choose to disclose. Instead, absent instruction from the rules of professional conduct or the Attorney Registration and Disciplinary Commission, it is the attorney's responsibility to comply with the ethical rules as he understands them. Accordingly, we find that a provision such as the one at issue here is against public policy, since it may operate to limit an attorney's disclosure to his clients. Consequently, since the voluntary payment clause does not provide a defense to [the insurer]. . . .

*Id.* at 1128-1129. A concurring opinion emphasized that “[w]hile it is clear that an attorney must disclose a professional omission to his client, it is far less clear how much detail an attorney must disclose to meet that ethical obligation. [Cit] I am certain, however, that an attorney has no ethical duty to ‘admit any liability’ to third parties to whom he failed to fulfill his legal duty, which renders the ‘admit any liability’ prohibition no threat to the public's interest.” *Id.* at 1129. The judge believed that the lower court had correctly rejected the insurer’s position based on the reasoning that there is a difference between “admitting liability” and admitting fault, and the judge also believed that there could be a duty to defend regardless of the provision. *Id.* at 1130-1131.

5. Other Insurance Considerations

It has been noted that the insurance carrier may be able to provide assistance to the lawyer in properly handling a potential legal malpractice action.
Some insurance carriers have resources available to help attorneys properly meet obligations going forward or even to help rectify a mistake by, for example, getting the consequential adverse order set aside. Although a lawyer might fear that reporting a borderline incident to the carrier could increase future rates, some carriers specifically exclude the reporting of potential claims from the insured's future risk assessment.

Brian Pollock, *Second Chance Surviving A Screwup*, 34 No. 2 Litigation 19, 25 (Winter 2008). One commentator has recommended that where time permits, the lawyer should attempt to speak with the malpractice carrier before admitting the mistake to the client, since “[c]arriers may be in a position to offer helpful guidance to the lawyer in minimizing the consequences of any serious error. The lawyer’s primary duty, however, is to the client and when time is important, the lawyer should not delay informing the client for any reason.” Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, Wisconsin Lawyer, 83-FEB Wis. Law. 6, 8 (February 2010). For lawyers concerned about premiums or insurability in considering whether to talk to the insurer about a mistake the lawyer has made, it has also been suggested that the lawyer:

Ask [the] carrier how it views [the lawyer’s] calls to discuss potential issues. [The] carrier should have someone knowledgeable available to discuss these matters and such discussions should have no impact on premium or insurability. Instead, the insurer should provide the lawyer a safe place to explore the potential problem and any ramifications and should trigger coverage under the appropriate policy so that coverage is protected if the matter becomes a claim.

Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, Wisconsin Lawyer, 83-FEB Wis. Law. 6 (February 2010).

*February 27, 2015*
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