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To Err is Human:
A Guide for Attorneys on
How to Manage Errors

“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 P’ship, LP v. Burns & Levinson, LLP*, 30 Mass.L.Rptr. 502, 507 (Mass. Supp. 2012).

Introduction

A day in the life of an attorney is not easy. Across all practice areas, they face rigid deadlines, busy calendars, and an endless stream of client demands. Even the most conscientious, hardworking and diligent attorney may make a mistake of significant consequence at some point in his or her legal career. The mistake may be sufficiently serious such that it may result in a legal malpractice claim. However, the attorney’s management of the mistake is often more important than the mistake itself. Moreover, failure to appropriately address an error can exacerbate the simple malpractice situation and give rise to disciplinary grievances or other claims and increased damages.

The political axiom “it is not the act but the cover up that causes trouble” applies to attorney errors as well. A desire to conceal mistakes is understandable. Lawyers may be embarrassed to admit to their clients and colleagues that they have made a mistake. However, notwithstanding this inclination, attorneys have ethical and professional duties to disclose mistakes to their clients.

This guide will address the relevant rules, laws and practice management steps that an attorney should consider when a mistake has been discovered. It will help in determining when disclosure to the client is necessary, what parameters the disclosure should consist of, and how to manage conflicts of interest. Understanding how to respond to errors will help attorneys mitigate potential losses and preserve client trust.

Foundation of the Duty to Disclose

The duty of an attorney to disclose a material error is as old as the profession itself, and is founded upon the attorney’s role as a fiduciary. One court has characterized the common-law duty to disclose possible malpractice as a “corollary of the fiduciary obligations of undivided loyalty and confidentiality” the attorney owes his or her client.¹ The duty is likewise codified in section 20 of the *Restatement Third of the Law Governing Lawyers*, which provides that a lawyer must keep a client reasonably informed such that the client can make an informed decision regarding the representation. One of the reasons why the law mandates disclosure is to permit the client to make an informed decision as to how to handle the error. In addition, the client may decide to terminate the lawyer’s services in light of the error.

Rule 1.4 of the *American Bar Association Model Rules of Professional Conduct* (hereinafter “ABA Rule”) echoes the *Restatement*, charging the attorney with promptly informing the client of decisions or circumstances where the client’s informed consent may be necessary, and keeping the client reasonably informed about the status of the matter. *Comment 7* to *ABA Rule 1.4* adds that “[a] lawyer may not withhold information to serve the lawyer’s own interest or convenience.” Any active concealment of the error on the part of the attorney also would run afoul of *ABA Rule 8.4(c)*, which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.

¹ *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009)

ABA Rule 1.7, which requires an attorney to obtain the client's informed consent, in writing, in the event of a concurrent conflict of interest, provides an additional basis for the duty to disclose. Specifically, *ABA Rule 1.7(a)(2)* places restrictions on an attorney who seeks to continue representing a client where there is a significant risk that the attorney's personal interests will materially limit such representation. For example, the "personal interest" in a potential malpractice scenario would present an element of self-preservation. The conflict of interest analysis that an attorney must undertake upon the realization of committing a substantial error will be discussed later in this guide.

The ABA's *Profile of Legal Malpractice 2008-2011* reveals that approximately 30% of legal malpractice claims are due to administrative error. Attorneys and law firms must train support staff to avoid errors and to alert their supervising attorneys in connection with any errors that they may have made.

Steps to Take When an Error Has Occurred

Once an attorney realizes an error has occurred, myriad questions arise, such as:

- Must every error be reported to the client?
- When should the attorney report the error to the client?
- What should the attorney say when disclosing an error?
- How should the attorney disclose an error?
- Should the attorney discuss the possibility of a potential legal malpractice claim?
- Does the error require the attorney to withdraw from the case or matter?

The manner in which the attorney responds to the aforementioned issues related to an error could represent the difference between avoiding liability and paying a substantial judgment or settlement in a legal malpractice matter.

Evaluate the Error

All errors are not equal. Errors can run the gamut from minor and correctible to substantial and damaging. One ethics opinion described this range of errors as the "spectrum of errors," with the reporting standard determined by whether a disinterested lawyer would conclude that the error would likely result in prejudice to a client's rights or claims.² If a disinterested lawyer would conclude that the error caused such prejudice to the client, then the error must be disclosed to the client. An alternative conclusion by the disinterested lawyer would nullify the duty to disclose the error.³

Examples of errors that do not require disclosure to the client include insignificant errors, such as most typographical or strategic errors. A strategic error includes the pursuit of one argument over another in an unsettled area of law, as these types of errors are either harmless or unlikely to cause reasonably foreseeable harm. In the words of the Colorado Bar Association, "missing a non-jurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may, upon discovery, prompt regretful frustration, but not an ethical duty to disclose to the client."⁴

² Colorado Formal Ethics Op. 113 (Nov. 19, 2005)

³ *Id.*

⁴ *Id.*

On the other hand, errors that will probably harm the client or have already inflicted such harm, such as the loss of a claim for failure to file within the statutory limitations period, must be disclosed promptly. However, an attorney is ethically permitted to take corrective measures before informing the client of an error. Notably, a later assertion of a malpractice claim by the client does not necessarily mean that the attorney breached a duty to disclose that error. From a practical perspective, relieving the attorney of a duty to inform the client of each and every minor mistake serves both parties, as such a duty would prevent the attorney from providing effective representation and may exhaust the client's patience.

In some instances, an error may reside in the middle of the spectrum and cannot clearly be labeled minor or substantial. Reasonable attorneys may differ on whether these "in-the-middle-of-the-spectrum" situations should or should not be reported to the client. As a result, attorneys may have to make a difficult judgment call. In these situations, consultation with outside counsel would offer the ability to receive a disinterested attorney's opinion before deciding whether or not to disclose the information.

If it is a Substantive Error, Notify the Client

Once the attorney has completed the evaluation of the error and determined that it must be disclosed, the attorney must inform the client of the factual circumstances surrounding the error and the consequences to the client's legal position in the current matter. The client may not fully appreciate the significance of even a seemingly straightforward error. Therefore, in accordance with *ABA Rule 1.4*, an attorney should be thorough in explaining all pertinent details. Other measures that should be taken, include the following:

- If the attorney has identified steps he or she could take to mitigate the loss, the attorney should discuss these steps with the client.
- Alternatively, the attorney should inform the client of the right to terminate the representation.
- The attorney also must inform the client that it may be in one's best interest to consult with independent legal counsel.
- The attorney may provide a referral to the client regarding independent legal counsel as long as the attorney is able to exercise impartial, professional judgment in doing so. Ideally, as a means to insulate the attorney from allegations of impropriety or a negligent referral, the referral will contain a list of several attorneys from which the client can choose.

A final element of this disclosure, and one that can cause problems for even the most well-intentioned attorneys, centers on what the attorney must say to the client with respect to the potential malpractice claim against the attorney. Jurisdictions are split on this issue. Some jurisdictions advise that the attorney is required solely to disclose the error and is not required to provide information to the client on any potential claim against the attorney. Other jurisdictions that have considered the issue state that a lawyer has an ethical obligation to notify the client of a possible legal malpractice claim against the attorney.⁵

⁵ Marian Rice, *The Policy of Honesty*, 39 No. 5 Law Prac. 16, 18, American Bar Association (2013)

The Ethics Committee of the Colorado Bar advocates a balanced approach in declaring that “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.*” The Colorado approach integrates and applies the guidelines set forth by most other authorities, and, in the words of the North Carolina Bar, “appropriately limits the possibility that a lawyer will attempt to give legal advice to a client about a potential malpractice claim against the lawyer.”⁶ Another advantage of informing a client about seeking the advice of independent counsel is deterring the ability to assert a legal malpractice claim based on the attorney’s failure to self-report.⁷

The content of the disclosure will vary by jurisdiction, so a universal approach is not possible. For example, the Colorado guidelines would fail to meet the disclosure requirements promulgated by the Supreme Court of New Jersey, which states that its “Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal-malpractice claim.”⁸ Consequently, attorneys should refer to local authorities for guidance on what they must disclose to the client regarding their own potential liability.

Make the Disclosure without Admitting Liability

While the majority of jurisdictions reflect the general consensus that an attorney must say *something* about the possible claim, they fail to provide any real guidance on the substantive nature of this obligation. In view of the obvious conflict of interest, an attorney would be precluded from commenting, even honestly, on any perceived weaknesses in the claim. On the other hand, the attorney must avoid admitting liability to the client. Acknowledging an error does not mean that the causation and damages elements of a legal malpractice claim have been established. Any statement admitting malpractice, or a comment as to the viability of a claim against the attorney, also presents the risk of waiving insurance coverage and burdening the attorney with undue liability where extenuating circumstances exist.

The duty of an attorney to disclose a material error is as old as the profession itself, and is founded upon the attorney’s role as a fiduciary.

⁶ North Carolina Bar, 2015 Formal Ethics Op. 4, p. 2.

⁷ Benjamin P. Cooper, *The Lawyer’s Duty to Inform His Client of His Own Malpractice*, 61 *Baylor Law Rev.* 174, 205-06 (2009)

⁸ *Olds v. Donnelly*, 150 N.J. 424, 442 (1997)

Deliver the News in a Professional Manner

Even for seasoned attorneys, disclosing an error to a client can become a daunting exercise. Regardless, disclosure must be prompt, and any delay that exacerbates damages, or prevents the filing of a timely malpractice action, will be attributed to the attorney. Ideally, the attorney should disclose the error in a face-to-face meeting. Where such a meeting would be unduly burdensome for the client, providing initial notice to the client in a letter, email, or voicemail should be avoided. Conveying a sense of accountability and candor also may help in minimizing the likelihood of a claim and salvaging a client relationship, especially in cases involving long-time clients. Following the meeting, the attorney should memorialize the disclosure in the form of a letter or email. Written documentation will benefit the client. Moreover, in the event of subsequent malpractice litigation, such written documentation will probably be presented to demonstrate how, when, or what the attorney disclosed. For this reason, the attorney should exercise due diligence in drafting such a letter.

Furthermore, the attorney should consider whether the client is entitled to a fee reduction. *ABA Rule 1.5(a)* addresses unreasonable fees, stating that any charges to the client for legal work or expenses necessary to mitigate the consequences of the attorney's own error are prohibited. The attorney also should examine whether other tasks contributing to or compounded by the error should be discounted or removed from the invoice under *ABA Rule 1.5*. Even if not ethically mandated, a discount in fees offered as a gesture of goodwill may help to dissuade a client from filing a claim or terminating the relationship.

Settlement with the Client

Certain caveats apply to attorneys who attempt to settle an actual or prospective claim with a client. A proposed discount in fees or an offer of additional funds made in exchange for a release of liability must be handled properly or the attorney risks losing insurance coverage and facing discipline. First, attempts to settle a claim before providing notice to the carrier jeopardizes insurance coverage as to that claim. We will discuss the importance of notifying an insurance carrier of a claim in a timely manner a little later in this guide. Second, attorneys also may face discipline if they fail to follow proper protocol for settling a malpractice suit with their own client. *ABA Rule 1.8* prohibits an attorney from settling an actual or potential malpractice claim with a client or former client unless the attorney first advises the client, in writing, of the desirability of seeking independent counsel. The attorney also must give the client a reasonable opportunity to consult with said counsel. In practice, this means ensuring a meaningful amount of time passes between the initial disclosure to the client, the settlement offer, and the client's acceptance of the offer, especially if the client remains unrepresented.

Undertake a Serious Conflict of Interest Review

As discussed earlier, *Rule 1.7(a)(2)* prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the personal interests of the lawyer. A lawyer tempted to hide his or her mistake by settling the underlying case and not informing the client of the error has created a serious conflict of interest issue by subordinating the interests of the client to his or her personal interests.

Other conflict situations may be more apparent. For example, if the attorney notifies the client of the error and the client expresses a desire to pursue a legal malpractice claim against the attorney, a clear conflict between attorney and client has developed. It may be difficult, if not impossible, for the attorney to render impartial legal advice and services in the underlying matter when the attorney believes that the client will soon become an adversary. As a general rule, the greater the risk that the lawyer will face a substantial malpractice claim due to the error, the greater the likelihood that the attorney's personal interest and ability to provide impartial advice will be compromised. Therefore, the representation of the client will be materially limited.

Under *ABA Rule 1.7(b)*, the attorney can continue to represent the client in the underlying matter only if the attorney "reasonably believes that [he or she] will be able to provide competent and diligent representation" to the affected client, among other conditions. Even if the attorney maintains such a belief where a substantial error has been committed, it may be more prudent for the attorney to remove the threat of conflict altogether and withdraw from the representation. If the attorney withdraws from the representation, permission of the appropriate tribunal must be sought when necessary in order to "take steps to the extent reasonably practicable to protect a client's interest."⁹

If, on the other hand, the attorney decides to remain as counsel with the client's consent, written consent of the client must be obtained in the form of a scrupulously drafted document. In the event of a subsequent legal malpractice matter, the client may assert that he or she would not have waived the conflict if all the facts had been disclosed. Moreover, the waiver may become admissible in future litigation against the attorney. Therefore, the attorney should consider consulting with his or her insurer and other counsel when drafting such a conflict waiver.

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⁹ ABA Rule 1.6(c) and (d)

Informing Your Law Firm of the Error

Partnership agreements and other terms of employment may require attorneys to promptly notify their law firms of any mistake or error that could lead to a legal malpractice claim. Even in the absence of such a requirement, consulting with another attorney in the law firm is an effective means of helping to avoid ethical missteps. Many firms designate in-house ethics counsel to provide this guidance. While this practice ensures that trusted advice is always readily available, attorneys must be aware of the risk that may flow from an in-house ethics consultation.

A primary issue is whether or not communications made to in-house counsel regarding a potential or actual error are protected by the attorney-client privilege vis-à-vis the client. The major arguments against applying the privilege to such communications are twofold. First, the client is entitled to receive or have access to such advice since such advice is ultimately for the client's benefit. Second, it would constitute an impermissible conflict of interest for the law firm to place its interests in maintaining the confidentiality of the advice ahead of the client's interest in knowing what intra-firm advice was sought and offered.

The trend in recent case law, however, protects communications with in-house ethics counsel if the law firm complies with four basic criteria:

- The firm must have designated a specific attorney or group of attorneys to serve as ethics counsel.
- Ethics counsel must not have performed any work on the client's underlying matter.
- Time allocated to consultation with ethics counsel must not have been billed to the client.
- Communications between the attorney and ethics counsel must have taken place in confidence and kept confidential.¹⁰

Trends aside, attorneys should refer to relevant case law to determine whether their communications with in-house counsel may be discoverable in a future malpractice action. Moreover, attorneys should always exercise caution in their intra-firm communications concerning the error regardless of the status of the law with respect to privilege. In some instances, oral communications may be preferable to written communications. Any written communications should avoid admissions of liability and gratuitous commentary that would harm the law firm's reputation if made public.

Former Clients

In the event that an attorney discovers a substantial error after an attorney-client relationship has concluded, the attorney has a duty to notify the former client of the error. This obligation is undertaken in order to ensure that notification might prevent future harm to the client's interests or alert the client to a viable malpractice claim. While a negligence action must be based on the existence of an attorney-client relationship at the time of the alleged malpractice, an attorney's fiduciary duties extend beyond the termination of the relationship, applying to both former and current clients.

¹⁰ See e.g., *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Ore. 2014)

The duty to a former client is articulated in the Model Rules, most prominently in *ABA Rule 1.9*, which addresses conflicts of interest and confidentiality with respect to former clients. *ABA Rule 1.16(d)*, which requires an attorney to protect the client's interests upon termination of the relationship, also is pertinent. The comment to *ABA Rule 1.16* adds that "[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client." It follows, therefore, that an attorney's obligation to disclose an error, arising from the fiduciary duty of loyalty, may continue even after the attorney-client relationship has ended.

Notification Obligation to Legal Malpractice Insurer

Attorneys should consider their duty to the client first and foremost in the event of an error, but an attorney also must be cognizant of the duty to their insurance carrier. An attorney who fails to properly notify one's insurer of a claim or potential claim risks waiving coverage and faces the formidable prospect of financing litigation and any ensuing damages. The terms and conditions of a policy will, of course, vary from carrier to carrier, but many professional liability policies share the same basic requirements.

Any claim made by a client, whether in the form of a demand for money or services, or an actual malpractice or disciplinary complaint, must be reported as soon as possible. A short passage of time to consider whether to file a claim is understandable, but any attempt to respond to or settle the claim prior to the insurer's involvement may void coverage.

Attorneys may, in fact, be better served by notifying their insurer of the error prior to informing the client. In certain instances, the insurance carrier may assign counsel to assist the attorney in exploring ways to minimize damage to the client and advising the attorney on what to say when disclosing the error to the client.

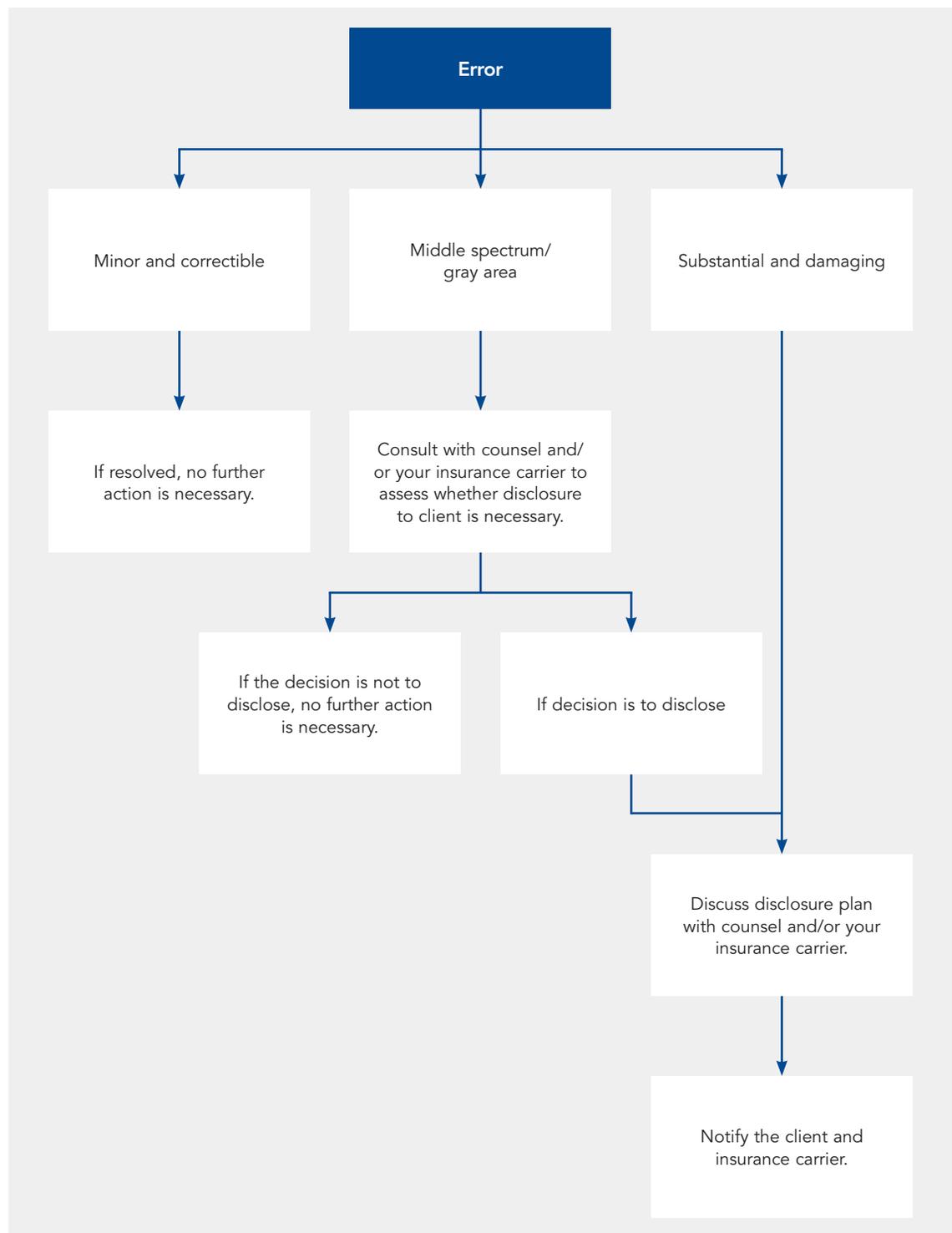
Danger of Fraudulent Concealment

An attorney's failure to disclose a mistake to the client may constitute fraudulent concealment. Fraudulent concealment is the act of withholding facts or information necessary to a cause of action for the purpose of preventing a plaintiff from bringing that action in a timely manner. Established in most jurisdictions either by statute or common law, fraudulent concealment is an equitable doctrine that tolls the applicable statute of limitations in order to prevent a party with superior knowledge from depriving a plaintiff of an otherwise meritorious claim.

With respect to most torts, the plaintiff must establish that the defendant took active steps toward concealing the cause of action. However, in view of the fiduciary relationship between attorney and client, silence alone, accompanied by the client's reasonable failure to discover the malpractice claim, is enough to toll the statute.

The precise effect of a client's successful claim of fraudulent concealment will vary. Some jurisdictions toll the statute of limitations until the client discovers the cause of action, while others simply prevent the attorney from asserting a statute of limitations defense. Irrespective of the relevant jurisdictional guidelines, an attorney who fails to inform the client of a potential malpractice claim is merely delaying the inevitable, and will likely encounter more severe consequences in the future. Those adverse consequences can include disciplinary sanctions, exposure to additional causes of action, increased damages, loss of reputation, and loss of insurance coverage.

Error Response Flowchart



Conclusion

Admitting a mistake is difficult, especially when such admission may result in a lawsuit. Nevertheless, an attorney who has committed malpractice has only one path forward: face the client, disclose the mistake, learn from the experience, and move on.

Attorneys always must be honest and straightforward. They should not bury their head in the sand, wallow in self-pity, and ignore the problem. In addition, attorneys should never attempt to cover up the mistake or falsify documents. The most prudent approach requires swift and appropriate action. By honestly confronting the mistake, it may be remediated in its entirety, or the potential damage may be reduced. At a minimum, by taking direct action, an attorney can limit the result of an error. One missed deadline or drafting error can ruin a client relationship, but failing to respond ethically can ruin a career.

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