To Err Is Human, But to Forgive . . . ?

by Martin J. Siegel

This is what it feels like. Of course, you wouldn't know—because you've never made this sort of mistake. You're too good a lawyer. But just so you know, it starts with a sort of dryness in the throat and gradually widens and descends to the pit of the stomach, where it takes up residence as a sort of dull, semi-continuous ache. As the scope of the problem begins to dawn on you, sweaty palms and knifing headaches set in. Instinctively, your body tries to defend itself. Eyes squint and arms flail frantically while you thumb through books, skim documents, and peck at computer keys in a desperate search for some cure. Not that I know what any of this feels like either, of course. I'm just guessing.

Okay, actually, I do. Once, long ago and far away, I made the sort of mistake that had me wondering how to contact the firm's malpractice carrier and how, exactly, I could explain this colossal screwup to my boss, let alone the client. In more introspective and self-centered moments—which is to say, most of the time—I wondered, "What else could I do with a liberal arts degree?" Fortunately, the mistake was corrected and calamity averted, but not before much briefing, wrangling, and angst. Without belaboring the sticky, unpleasant specifics, it was the sort of technical, procedural mishap my more seasoned adversary recognized from the first moment of the case and, being the good lawyer he was, waited patiently to unveil at the most opportune moment, when its detonation would inflict the maximum damage.

Like humans everywhere, I reacted to my misfortune by lashing out and blaming others. This was completely irrational and indefensible, absurd even, as the mistake was entirely mine. But in my crisis-induced delusion, I began to view the lawyer whose skillful advocacy had kicked me into this circle of hell as the culprit, a master of dark arts not fit to practice our clubby and otherwise decent profession. *Is there no honor among lawyers? Who would want to win a case this way? Couldn't we have fixed this with a quiet phone call, a friendly bit of advice to a brother of the bar that would have sent us all back to determining the justice of the matter?*

Years later, I found myself on the other end of this sort of thing. Our adversary, the plaintiff, believed he had secured an extension from the court for his opposition to a motion for summary judgment. He was mistaken, and when no opposition appeared, the court granted a default judgment. The plaintiff then moved to set aside the default, making various additional errors of form in that motion. I took no part in the case until asked to cover the hearing on the motion, but once involved, I wondered how hard to stress our opponent's procedural snafus—particularly in light of my own earlier experience. Standing on the formalities seemed petty and unjust, but, after all, our client had won the case. Could I exalt my own sense of fairness over her interest in maintaining the victory? Should I? By default, you might say, I settled on the not altogether satisfying strategy of blandly and neutrally reciting what had happened without arguing very strenuously against the motion, giving the court the history but leaving it to decide what to do without much advocacy from me. After lecturing the defaulting lawyer, the court vacated the default, which, as it happens, was the correct decision given how the default had come about and how rapidly it was cured.

These sorts of experiences, unnerving when they happen but hardly rare, raise the question of how lawyers should react when opposing counsel make mistakes or need help. In an adversary system, our first instinct is to lick our chops and pounce. But suppose it is the holiday season, your opponent's birthday, or whatever else moves you to generosity. When can you offer assistance to opposing counsel, and why should you consider doing so? In analyzing these questions, it might be useful to think in terms of three ascending levels of need, start-

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ing at the bottom with routine courtesies, rising to an intermediate level of errors with some but not decisive impact on the case, and culminating in litigation-ending debacles. Looking at each level offers insight into the different rules and rationales in play when it comes to offering help to your adversary.

At the bottom of this hierarchy, we encounter mistakes that call for exercising what falls under the broad heading of "civility" or "professional courtesy." Amid the diffuse but growing sense that law had become just another service business and its practitioners prone to behaving badly, the 1980s saw the rise of a movement intended to inculcate professionalism and civility among lawyers. "Has our profession abandoned principle for profit, professionalism for commercialism?" asked the ABA Commission on Professionalism, established in 1985 at the behest of Chief Justice Burger. The Stanley Commission, named for Chair Justin A. Stanley, made a variety of recommendations for lawyers, courts, law schools, and bar associations, ranging from greater teaching of ethics to stricter and clearer regulations governing deceptive advertising and attorneys' fees. *See Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 112 F.R.D. 243 (Aug. 1986). Following the Stanley Commission, jurisdictions from state bars and bar associations to individual courts began promulgating "civility codes" that spelled out the various ways lawyers ought to play well with one another. Odds are, you are covered by one of these codes in most if not all of your cases. The codes are hortatory and not intended to form the basis for sanctions or other disciplinary action, but judges who want to embarrass lawyers for their unprofessionalism in written opinions do not hesitate to cite them. More importantly, the codes provide something of a guide to local legal custom.

Civility codes generally cover the sorts of routine mistakes all of us make from time to time and would like our adversaries to help fix. Opposing counsel has miscalculated his schedule and needs a two-week extension on his response to your motion. The ABA Section of Litigation's Guidelines for Conduct provide that "we will agree to reasonable requests for time and for waiver of procedure . . . provided our clients' legitimate rights will not be materially or adversely affected." *See* www.abanet.org/litigation/conductguidelines. Opposing counsel has failed to have her witness present and needs you to stipulate to facts that, truth be told, you probably would not have contested anyway. The Lawyer's Creed of Professionalism for the State Bar of Arizona provides that, "[i]n civil matters, I will stipulate to facts as to which there is no genuine dispute." *See* www.myazbar.org/members/creed.cfm. In carelessly reducing an agreement to writing, opposing counsel sends over a draft omitting a concession you made. The Texas Lawyer's Creed exhorts: "I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties." Texas Lawyer's Creed, www.Texasbar.com, Search "Lawyer's Creed." Your opposite number has misplaced her copies of the exhibits to be used at the deposition she noticed, and asks to use or copy yours. The Mississippi Lawyer's Creed states: "If a fellow member of the Bar makes a just request for cooperation . . . I will not arbitrarily or unreasonably withhold consent." See www.msbar.org/2_lawyers_creed.php. More generally, Ethical Consideration 7-38 of the ABA Model Code of Professional Responsibility provides: "A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client."

The civility codes give lawyers leeway to agree to rectify minor errors committed by opposing counsel, even when clients clamor to press every possible advantage. The Texas Creed is typical: "I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel." There are exceptions. In Missouri, a lawyer was admonished for agreeing to an otherwise routine continuance as a matter of courtesy when his client had a particular reason for keeping the trial date and had directed the lawyer accordingly. *See* Glenn E. Bradford, "Who's Running the Show? Decision-making in the Courtroom in Civil and Criminal Cases," 62 *Mo. Bar J.* 148, 153 (May-June 2006). But the general rule is that the lawyer has authority to control all tactical and procedural decisions, while the client retains power to decide matters affecting substantial rights. *See, e.g., Blanton v. Womancare, Inc.*, 696 P.2d 645, 650-51 (Cal. 1985).

Even when the authority is entirely theirs, practitioners, especially newer ones who have yet to make these minor missteps, may wonder why they should bother extending a helping hand to the enemy. Of course, the first and most obvious answer is that, soon enough, the shoe will be on the other foot. Your box of documents will have been lost by the airline. Your witness will have gone AWOL. Your other cases will suddenly and unexpectedly rise from the dead, necessitating the faintly embarrassing phone call seeking an extension. Civility, in other words, is very much in your narrow personal interests.

It is also in your larger interest, as someone occasionally ostracized at cocktail parties or made to endure "lawyer jokes" because of your choice of profession. Lawyers squabbling over one another's mistakes and other points of little consequence inevitably cause the public to lower its already unfairly low

view of what we do for a living. Tennessee Court of Criminal Appeals Judge Penny White reminds us that "[b]ecoming a lawyer does not require you to lose your humanity. Even though you have reached that elevated and lofty place—lawyerhood—don't leave your civility and common decency behind. Act like a human. If you have forgotten how, fake it." Penny J. White, "10 Things They Never Taught You in Law School," 30 *Tenn. B. J.* 20, 21 (May/June 1994). When lawyers cannot even fake it, they can hardly expect much esteem from the public.

Finally, agreeing to help rectify rather than exploit opposing counsel's minor mistakes is also in the interest of the judicial system we ostensibly serve along with our clients' interests. If your adversary has made a mistake and now needs a favor from you, he is unlikely to go away when you chuckle and tell him to buzz off. Rather, he will seek relief from the court, delaying its resolution of more important matters in your case and others and making you look bad for failing to agree in the process. What the Litigation Section Guidelines observed of civility generally is equally applicable here: "Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice."

Innocuous as the civility codes seem—does anyone really object to good manners larded with the occasional smidgen of decency?—they are not without critics. Some call them a throwback to the days of privilege and exclusion, when the practice of law was dominated by an old boys' club guided by the cultural norms of the upper crust. Others assert that civility stifles other, more confrontational styles of advocacy that might be appropriate in certain cases, especially those where social causes are at stake and more polite tactics have failed. True or not, these complaints are beside our simpler point here, which is only that the codes illustrate what otherwise might be counterintuitive in a system that deliberately pits lawyers against each other—namely, that the profession sees amelioration of opposing counsel's minor errors as commendable, not wimpy.

A second category of errors encompasses those more serious than the occasional lapse requiring an extension or stipulation. These are mistakes that wreak greater havoc on the case, though they are not so substantial that they necessarily threaten the client's fundamental rights. What if opposing counsel poorly frames written discovery requests or deposition questions so as to allow a technically true but substantively uninformative answer? What if a mistake in service or locating a witness leaves you knowing the whereabouts of a key witness but your adversary in the dark? What if you inadvertently produce privileged documents?

Although errors of this sort have greater impact on the case, there are still good reasons to assist rather than exploit. Take inadvertent privilege waiver, which Lawrence Fox, former chair of the Litigation Section, calls a litmus test of how lawyers do and should treat each other:

> Perhaps there is no better example than the way we treat the inadvertent fax, the one from the lawyer on the other side with the cover sheet that shows it's not for you, and the contents are clearly confidential and privileged. There are those who think the effective litigator has an obligation to use the document and keep opposing counsel blissfully uninformed that it was missent. On the other hand, there are those who recognize, quite correctly, that they have no more right to use or read such a document than they would to rifle their opponent's briefcase left in a conference room during a lunch break at a deposition; those who understand that we must take care of each other.

Lawrence J. Fox, "Take Care of Each Other," Vol. 22, No. 1 LITIGATION 1, 2 (Fall 1995).

The older, traditional view of inadvertent waiver has been "too bad, so sad." To the District of Columbia Circuit, inadvertent production demonstrates simply that someone has been "careless," and "the courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989). Worse still, not only does the mistake waive the privilege as to the documents erroneously transmitted, but it does so to *all* related documents, even those not produced. *See id.* at 981-82. Yikes.

Thankfully, the more recent and prevalent view is to show mercy. Most courts now either analyze a range of factors before waiving the privilege, including what measures were taken to review for privilege and the overall fairness of finding waiver, or they absolve inadvertent production altogether because negligent production can never constitute an intentional and voluntary relinquishment of rights. *See, e.g., Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 937-39 (S.D. Fla. 1991). Moreover, new Federal Rule of Civil Procedure 26(b)(5)(B) provides a mechanism whereby the erring lawyer can compel his adversary's non-use and sequestration of the mistakenly disclosed material until the court rules on the validity of the waiver. And courts can react strongly to attempts to capitalize on counsel's erroneous production of privileged documents. In a recent case in Georgia, the court pronounced itself "deeply disturbed" by counsel's appending his adversary's mistakenly produced privileged documents to a brief, especially because counsel had seemed to promise his adversary that no such use

would occur. *See Lazar v. Mauney*, 192 F.R.D. 324, 330 (N.D. Ga. 2000). The court stated:

> Mistakes of this type are likely to occur in cases with voluminous discovery. . . . At best, these situations are resolved amicably, by counsel returning documents which are *obviously privileged and inadvertently produced.* It is *unfortunate* that such could not be the case here and that the [c]ourt was forced to expend a great deal of time on this relatively minor matter.

Id. (quotations omitted, emphasis in original).

Inadvertent privilege waiver points up another reason why lawyers might elect to help correct the mistakes of opposing counsel rather than try to take advantage of them: the dignity and collegiality of the bar. The current rationale for the attorney-client privilege—promoting clients' ability to obtain candid advice from their counsel—was not the original reason

The privilege arose because it would have been beneath a barrister's dignity to have had to plead against a client.

communications were deemed confidential. Rather, the privilege arose in Elizabethan England because barristers were considered gentlemen, and it would have been beneath their dignity to be made to take the witness stand to plead against their clients. *See* Daniel R. Fischel, "Lawyers and Confidence," 65 *U. Chi. L. Rev.* 1, 2 (Winter 1998); *Duplan Corp. v. Deering Milliken, Inc.*, 370 F. Supp. 761, 767 (1972) (citing 8 Wigmore Evidence § 2290 (citing *Besel v. Lovelace*, (Ch. 1577), 21 Eng. Rep. 33)). Thus, the privilege originally belonged to the lawyer, as an arrow in the quiver protecting his rank, rather than to the client. To use a fellow lawyer's communications was to trample on his honor.

There is much of Tudor England we probably do not miss, but doing favors for opposing counsel for no reason other than to acknowledge their place in the prized club of lawyers—to honor their professional honor—might be worth considering, anachronistic as it sounds. If nothing else, it might make all of us feel a little better, a little less pedestrian and mercantile, about ourselves and how we approach our work, even as we know that pleasing clients and not fellow lawyers is necessarily 99 percent of what we do each day. As a Pennsylvania Supreme Court justice observed: "One of the great satisfactions in the practice of the legal profession is the reciprocal good faith, mutual respect and courtesy that normally exist between and among lawyers in the conduct of litigation, as well as in their other dealings with each other." *Fox v. Mellon*, 264 A.2d 623, 627 (Pa. 1970). Helping a colleague in need helps promote this great satisfaction.

Other errors that fall into this intermediate category, like poorly phrased discovery or missing witnesses, call to mind yet another rationale for cooperating with opposing counsel: the obligation to uncover facts rather than hide them. For example, little time generally passes before a litigator encounters the deposer who embarks on a series of garbled or opaque questions—perhaps the incomplete information she possesses at this stage of the case is the cause—leaving the witness to scratch his head or provide an unintentionally misleading answer. There is a painful moment as the questioner struggles to ask exactly the right question, the witness struggles to respond, and you sit there quietly, knowing full well what the questioner really means to ask and what the answer will be if and when the matter is cleared up. Piping up at that moment with assistance in the form of "what I think you're getting at is . . . " allows the deposition to fulfill its core function of unearthing evidence, even if the answer to the question you helped reframe may not necessarily be helpful. Beyond mere courtesy or honoring the ancient fraternal order of lawyers, there is the more systemically fundamental duty to ensure that "discovery together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). Whenever cooperating to cure the lapses of other lawyers serves this end without endangering the client's substantial rights, it should be indulged.

Finally, there are the most serious sorts of mistakes—the blatant ones that will obviously lose the case, cannot be fixed once they have happened, and make you gasp in horror when you learn of their occurrence. The paradigmatic example of this kind of blunder is the calendaring error that leads to the missed statute of limitations or appellate deadline. Other examples might be failing to hire the right sort of expert witness, causing the court to grant summary judgment; or completely missing applicable law in framing claims or defenses or addressing a motion. When opposing counsel's mistake is more substantive, there is obviously very little to be done. You cannot litigate for your adversary, always editing and improving his strategies, arguments, and witnesses until the sides are effectively equal. Moreover, the client injured by her lawyer's negligence can always seek recourse in the form of a malpractice claim, though that remedy is uncertain, will cost money and take years, and may be limited by whatever insurance policy the lawyer has in effect. But when the mistake is more in the nature of a simple procedural oversight, the system provides conflicting cues.

On the one hand, the civility codes enjoin lawyers to focus on substance, not form. Likewise, "[t]he Federal Rules of Civil Procedure are designed for the just, speedy and inexpensive disposition of cases *on their merits*, not for the termination of litigation by procedural maneuver." *Sun Bank of Ocala v. Pelican Homestead and Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989) (emphasis added). Elevating a mistakenly missed deadline over the merits of the parties' dispute is the ultimate repudiation of this elementary value. This admonition—to cooperate in doing justice in the case—should be the most persuasive rationale for assisting an adversary. And indeed, the civility codes and courts recognize this when it comes to default judgments. Like other codes, the Litigation Section Guidelines provide: "We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity, unless the rules provide otherwise."

More importantly, courts often enforce this norm, even if applicable procedural rules do not specifically require checking with counsel for the defaulting party. *See* Adam Owen Glist, "Enforcing Courtesy: Default Judgments and the Civility

Movement," 69 *Fordham L. Rev.* 757 (Nov. 2000) (collecting cases). A few examples set forth by one commentator illustrate the custom:

> One practitioner recalls the words of a senior attorney in the small western city where he first set out to practice: "You don't default a colleague." A retired state high court judge tells the story of a friend rebuked rather than rewarded for promptly moving for a default judgment in his first assignment as a law clerk for an older, well-respected trial lawyer. That lawyer quickly instructed the zealous novice, "We just don't take defaults in these circumstances." Another judge advises that "in theory there may be opportunity to take a default or default judgment. Best to talk to opposing counsel, and inquire whether some extenuating circumstance exists." He continues, "You likely will make a friend of a fellow lawyer with whom you will be dealing for many years."

Id. at 762 (citations omitted).

Similarly, in one case where counsel obtaining the default judgment spurned the phone calls of the erring lawyers before taking the default (though he did directly notify the opposing party), the court chastised the guilty lawyer for proceeding in bad faith: "The trial of a lawsuit is not a sporting event where the substantive legal issues which precipitated the action are subordinate to the 'rules of the game.'" *Duckson v. Wee Wheelers, Inc.*, 620 A.2d 1206, 1212 (Pa. Super. Ct. 1993). "Without the rudimentary amount of courtesy or accession to reasonable requests, the legal profession is demeaned and its procedures reduced to a 'vulgar scramble.'" *Id.*

Although litigators are encouraged to forgo the snap default and communicate with opposing counsel to prevent judgment based on procedural lapse, the opposite rule obtains when a similar mistake results in a missed statute of limitation or appellate deadline. In that situation, which is not clearly conceptually different from a failure to answer, we are forbidden simply to blow off the mistake and proceed with the case, lest we forfeit a fundamental defense for our client. The client is entitled to have the case dismissed on the ground of the error. In one recent case in Pennsylvania, the lawyers entered into a stipulation to proceed with an appeal despite its untimeliness. When the client learned of his lawyer's agreement to permit the late appeal, and objected—represented by new lawyers, it might be added—the lawyer who missed the deadline and benefited from the stipulation argued that he and his adversary had only been practicing a laudable form of professional courtesy. The court disagreed, refusing to "treat the oral stipulation to extend the time to appeal as a mere technicality and as a custom of the bar in Elk County, as argued." *Wolfe v. Detsch*, 1996 WL 932768 at *4 (Pa. Com. Pl., Elk Co. Pleas. 1996). Here, the court concluded

> the stipulation entered by counsel was not a procedural matter but directly affected the plaintiff's substantial rights in maintaining his judgment securely without risk of having it overturned on appeal. We cannot brush the stipulation aside as being a mere procedural courtesy between counsel that has no impact on plaintiff's property rights.

Id. at *3.

While the decision to overlook or cash in on a case-determinative error belongs to the client, the lawyer is not without at least some power over the outcome. The lawyer can stress that assisting the opposition and focusing the case on the merits will earn goodwill that will lead to a fairer, less winner-take-all resolution. In a larger sense, clients will benefit from the reputation a lawyer garners as one willing to assist other lawyers; when that lawyer needs help of some kind or another, it will be forthcoming, to the benefit of all her clients. Of course, the client so public-spirited as to help head off an outcome-determinative error by the other side may be so rare a species as to be mythological, but one approach is to discuss such issues with clients at the outset of the case. Along these lines, most civility codes stress that their standards should be explained to clients up front. The Litigation Section Guidelines go as far as to include a pledge by clients

> declar[ing] that every lawyer who is employed by or associated with us is expected to abide by the Guidelines. . . . We recognize that overly aggressive litigation tactics and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance legitimate interests.

Following Chief Justice Burger's efforts on behalf of civility in the 1980s, Xerox Corp. published an open letter to its many counsel disapproving the "exhaustion of adversarial opportunities" at the expense of "the efficient administration of justice above and beyond the particular issues in a given lawsuit." Stanley Commission Report, 112 F.R.D. at 311. True, civility codes do not oblige clients to give up absolute procedural defenses like the statute of limitations, but considering the reasons for doing so is a shorter step for the client introduced to the idea at the outset, as distinct from the one who first confronts the concept when simultaneously presented with the happy and unexpected windfall of the other side's mistake.

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The paradox of assisting opposing counsel is that the greater the mishap, the less latitude lawyers have to extend a hand. When it hardly counts, helping opposing counsel presents few difficulties. As it gets more serious, and the systemic reasons to offer aid and refocus the case on the merits consequently become more compelling, lawyers' hands become tied. It was not always this way. In 1836, the Baltimore legal historian and teacher David Hoffman recorded "49 Resolutions in Regard to Professional Deportment," one of which states: "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defense than the *legal bar*, he shall never make me a partner in his knavery." David Hoffman, *A Course of Legal Study*, at 754 (reprint ed., 1972) (emphasis in original). In another resolution, Hoffman, speaking of escaping a debt on the ground of infancy, expounds: "And although in this, as well as that of limitation, the *law* has given the defence . . . yet, in both cases, *I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions proper for their use." *Id.* at 754-55 (emphasis in original).

Times sure have changed.