



MAKING ~~MISTAKES~~

BY **KATE GEENTY**

Everyone makes mistakes sometimes, even lawyers. A mistake could be caused by a lack of knowledge, or bad judgement. "Mistake is not intentional – the lawyer's decision to act or not may be intentional, but the poor outcome is unintentional," says Catherine Gage O'Grady from the University of Arizona's James E. Rogers College of Law, in a recent research paper called *A Behavioural Approach to Lawyer Mistake and Apology*.

Perfectionism and the fear of making mistakes

The legal profession tends to attract a lot of perfectionists, who work hard and hate the idea of mucking up. Clinical psychologist Gwendoline Smith says there are different types of perfectionism – positive and negative. A negative perfectionist is driven by a fear of both making mistakes and being seen to make mistakes. “Accompanying that is the fear of being evaluated by their peers, therefore they will spend enormous amounts of time checking and rechecking their work.”

A positive perfectionist is driven by a desire for excellence and to do the best job they possibly can. “But they know when to finish something,” Ms Smith says. “They know when they’ve done their best and they’ll finish it. They don’t need to spend another seven hours checking and changing. So in my observation, people that survive comfortably and do well in the law are in that group, the positive perfectionists.”

However, that’s not to say that negative perfectionists won’t be successful in the legal field. “It just means that it takes a toll on their health and it takes a toll on their work/life balance,” Ms Smith says, adding that a focus on perfectionism and constantly worrying about making mistakes is linked with burn out.

Are you a winner or a loser?

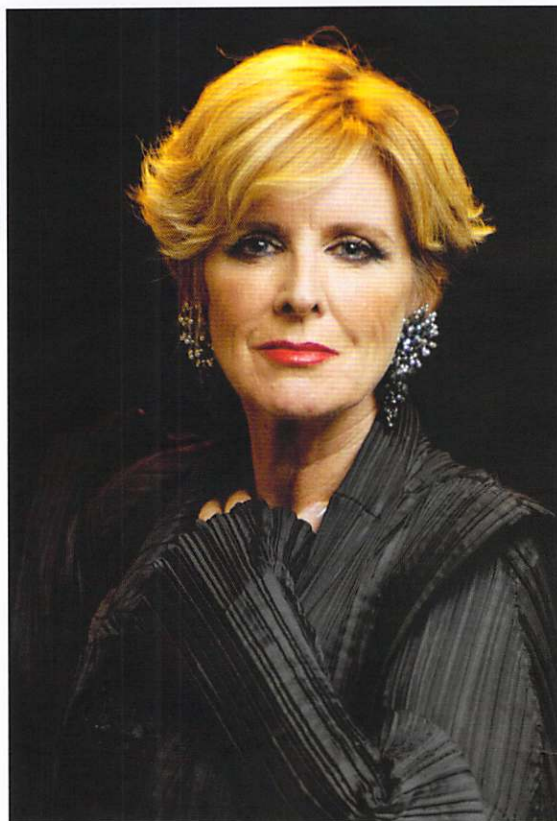
Even if you’re not a perfectionist, there is a tendency for lawyers to have a black and white approach to their work. “Because it’s this analytical true/false kind of profession in a lot of ways – lawyers tend to think about things being either right or wrong, you either win or lose. That kind of binary thinking can be unhelpful in a situation where really it’s less important whether you’re right or wrong or who wins or loses but that you fix whatever it is that’s problematic,” says lawyer-turned-executive consultant Emily Morrow.

Creating an accepting culture

A fear of losing and the desire to fit into a ‘winning’ team could also discourage lawyers from acknowledging or admitting mistakes, Professor O’Grady says in her research paper. She says firms that are structured hierarchically do not typically encourage mistake acknowledgement because “firm leaders often view errors as ‘indicative of incompetence’ leading people in organisation hierarchies to ‘systemically suppress mistakes and deny responsibility.’” She says work teams developed within these types of firms present their own ‘moral universe’ which may make ‘winning’ the central mission of the team.

Instead of pushing a winning mentality, firms should try to create an environment of ‘mistake acceptance’, Professor O’Grady says, so lawyers understand it is safe to confess if they’ve made an error.

“When lawyers feel that they can discuss mistakes openly and confidentially with their supervising attorneys or with a trusted member of the firm, more



▲ Clinical psychologist Gwendoline Smith

▼ Catherine Gage O’Grady from the University of Arizona’s James E. Rogers College of Law, author of research paper *A Behavioural Approach to Lawyer Mistake and Apology*.



mistakes will be detected and ultimately reduced.”

She says creating work environments that promote early recognition and acceptance of mistakes “serves to contain unfortunate situations, avoid one mistake building incrementally on another, discourage denial and cover-up, and facilitate learning for professional growth.”

Some bigger firms in the US have an ethics counsel or an attorney who is available to confidentially talk through matters concerning ethics or mistakes. While smaller firms may not be able to provide a dedicated staff member, Professor O’Grady says firms of any size can provide a process or system for discussing ethical questions and exploring mistakes. She cites a partner at a US firm called Wiggin and Dana who regularly sent emails to his firm that he called ‘wit and wisdom’ messages.

“While some of the emails imparted ethical guidance on specific issues like conflict of interest, improvident emails, or writing engagement letters, many of them simply reminded attorneys that they should not attempt to fix mistakes or fix potential problems themselves, and the messages underscored that lawyering mistakes will be accepted by firm leaders, but an attorney staying quiet about a mistake will not be,” Professor O’Grady says.

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How should you react to a mistake?

There is a spectrum of responses available to lawyers who realise they have made a mistake, says Ms Morrow. “At one end of the spectrum is doing nothing—not contacting the client and doing everything you can to cover your tracks and hope the worst doesn’t happen. At the other end of the spectrum is complete transparency, consisting of contacting the client and saying ‘I’ve just realised that something has happened, nothing may come of it, but I want you to be aware of it and the buck stops with me.’”

Ms Morrow says it would be an unusual lawyer or law firm that would opt for the full transparency approach immediately. “Personally, I think a good approach may be somewhere more towards the middle of the spectrum, at least



initially, where you don't go rushing out with the fire engine, nor do you go into complete denial."

She says the first step should be a discussion within the firm about the potential fallout from whatever it is that has happened.

Being prepared

A firm should have some policies and procedures in place to handle problems associated with errors, both big and small.

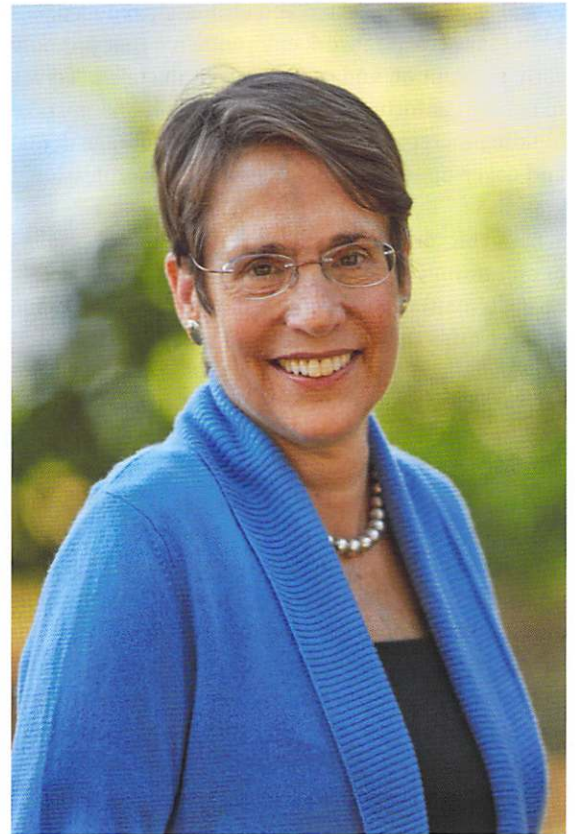
Ms Morrow says trying to deal with mistakes on the fly, rather than through set policies and procedures, is unlikely to lead to the best outcomes for you or your clients. "Decisions made under stress after something has gone wrong often are not ones that will stand the test of time well. Good process correlates with good outcomes; bad process correlates with bad outcomes."

The process by which such policies are developed is as important as the policies themselves. "The best outcomes are where the behaviour that's being modelled around the drafting and formulating of the policies and procedures is consistent with the behaviour that the firm wants to encourage when problems develop. Ideally, the process of articulating the policies/procedures should consist of a transparent, open, honest, emotionally neutral and inclusive discussion (not just the most senior people huddling together). In this way, a firm can ensure there will be an alignment between those policies/procedures and reality. Without that, it's unlikely the policies/procedures will be followed in stressful situations when they are most needed." Ms Morrow says.

Dealing with complaints

The New Zealand Law Society has issued a Practice Briefing on running an effective internal complaints process. It says your initial response to a complaint made by a client should be to:

- Acknowledge the complaint at the earliest possible opportunity – preferably within two to three days.
- Reply in the same medium (telephone, email, letter) in which the complaint was made.
- Asking a caller to submit the complaint in writing may not always be appropriate and could potentially escalate a matter that could be resolved more simply.
- Clarify your understanding of the complaint and the complainer's expectations.
- Explain the next steps of the process.
- Explain what, if any, impact the complaint may have on any current matter in which the firm is acting.
- Provide information about what to expect.
- Set a realistic timeframe.
- Give a full explanation of what is being done to address the complaint.
- Avoid using legal jargon.
- Many clients worry that they will be charged for making a complaint. Reassure them they will not be charged.



▲ Lawyer turned executive consultant
Emily Morrow

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The Practice Briefing says a final decision should be made on every complaint. "Do not leave matters unanswered or unresolved in the hope it has gone away of its own accord." A decision should be easy to understand and written in plain English. If evidence of poor service is found you should acknowledge this and offer a remedy, which might include compensation for loss, stress or anxiety suffered, an offer to put things right, or a reduction in fees.

Continuing to act for the client

Under Rule 5.11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 you may have to stop acting for a client if you become aware that the client may have a claim against you. You must advise the client to seek independent advice, and inform the client that you may no longer act for them unless, after receiving independent advice, they provide their informed consent.

A complaint can also raise implications for your ability to continue to take instructions from a client who lodges a complaint. Many complaints can be addressed and resolved and may cause no significant issues. However, if the complaint causes the relationship of trust and confidence between the lawyer and the client to suffer irreparable damage (eg, where your ability to advise may be compromised by the need to defend your own conduct) you may need to consider whether you can continue to act. If you cannot you should give reasonable assistance to the client to find another lawyer.

Say sorry, but do it carefully

Depending on the circumstances, an apology might also be in order. Apologising to a client who has made a complaint about a minor matter could clear the air quickly and restore goodwill and trust. However, if the matter might involve negligence on your part you may need to check in with your professional indemnity insurer before saying sorry, as an apology could be seen as an admission of liability.

Tanya Walsh, Auckland manager for Marsh's FINPRO, says while an apology can be an important tool in potentially calming down a situation, it needs to be delivered in a way that doesn't come back to bite you. She says if you are at a point where you think an apology is in order, get in touch with your broker or insurer to outline what's happened and what you plan to do: "Just to make sure the insurer is happy with what you're planning and can provide advice if they think there is a better way things can be handled." If you plan on putting anything in writing, Ms Walsh suggests running a draft past your insurer or broker. "It's not that the insurer is going to say 'no, don't do it', it's just really making sure they you're doing it in a way that can't come back to you."

Facing the music

If your internal processes don't satisfy your client, you might end up facing a formal complaint sent to the Lawyers Complaints Service. Neil Mallon, NZLS National Complaints Manager, says that in his experience lawyers standards committees accept that lawyers are fallible and may make mistakes from time to time. A standards committee looks for insight from lawyers as to how the mistake happened and why. "Insight limits the prospect that this person will do the same thing again, and that's an important factor

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▲ Mary Ollivier, Law Society General Manager, Regulatory

in terms of protecting the public."

Mr Mallon says it's also useful if a lawyer can show how they have addressed the mistake. "If, for example, a junior lawyer has made a mistake it may assist if the lawyer is able to demonstrate steps taken to make sure it won't happen again. That could be extra training or support from a mentor or supervisor."

Mary Ollivier, General Manager, Regulatory at the Law Society says standards committees may consider whether the conduct of the lawyer facing a complaint appears to be a one-off or out of character. How the lawyer has acknowledged the mistake may also be taken into account. "If a lawyer admits they've made a mistake right away and tried to make it right – by apologising, perhaps providing a fee reduction or trying to fix whatever has happened – and there haven't been major damaging consequences for the clients, that may ameliorate any disciplinary consequences," Mrs Ollivier says.

However, even if no adverse finding is made a lawyer may on occasion have to pay some costs towards the inquiry. "It's highly unlikely the lawyer's name will be published [if no adverse finding has been made] but the facts might be published as a lesson for other lawyers to see how that sort of mistake can happen."

A genuine mistake with no dire consequences might be forgivable, but trying to cover up a mistake is likely to lead you into disciplinary territory. "That's dishonesty, and lawyers simply can't be dishonest," says Mrs Ollivier.