

Confessing Sins to Clients Part II: Do You Risk Losing Malpractice Insurance Coverage?

by Keith A. Call

In our last issue, I discussed an attorney's ethical obligation to voluntarily report serious mistakes to a client. But when you make those confessions to your client, do you risk losing insurance coverage from your malpractice carrier?

Look in the glove box of your car. You will probably find a document from your automobile insurance company telling you what to do in case of an accident. That document probably says something like "DO NOT ADMIT FAULT EVEN IF YOU THINK THE ACCIDENT WAS YOUR FAULT."

Now, try digging through your office cabinets to find a copy of your malpractice liability policy. Your policy may have a "voluntary payments" clause that reads something like this:

"[L]isten to your insurer's advice, but don't allow the insurer to suck you into disclosing less than you are ethically obligated to disclose."

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.

See, e.g., *Illinois State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., PC*, 980 N.E.2d 1120, 1122 (Ill. App. Ct. 2012) (emphasis added).

Coverage Denied!

The defendant in the Illinois case, attorney Frank Greenfield, faced this dilemma. After his estate planning client died, Mr. Greenfield discovered he had made a mistake in the estate plan documents. *Id.* As he was ethically obligated to do, Mr. Greenfield sent a letter to the beneficiaries in which he admitted he had made a "scrivener's error" and that, but for the error, those beneficiaries would have realized an additional \$800,000. *Id.* at 1121–24.

When Mr. Greenfield's efforts to persuade the trustees to "do the right thing" failed, the beneficiaries sued Mr. Greenfield for malpractice. See *id.* Adding insult to injury, Mr. Greenfield's malpractice carrier denied coverage, invoking the voluntary payments clause in the policy. *Id.* at 1121. The insurance company admitted that Mr. Greenfield had an ethical obligation to disclose his mistake to the beneficiaries. *Id.* at 1124–27. But it argued Mr. Greenfield's letter went too far. *Id.* at 1124. It complained that, rather than merely relating the "facts" of what

happened, Mr. Greenfield admitted "liability." *Id.* The company also complained that Mr. Greenfield unduly delayed reporting his error to them. *Id.* at 1127. As the insurance company put it:

[Mr. Greenfield] was not obliged to admit 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 the delicate situation.

Id.

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.



Saved by the Court

Luckily for Mr. Greenfield, the Appellate Court of Illinois held that the voluntary payments clause was unenforceable as a matter of public policy. *Id.* at 1128–29. The court opted not to jump into the mire of distinguishing “fact” from “admission of legal liability.” *Id.* at 1128. As the court put it:

[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.

Id. Wisely said.

Practice Pointers

The *Greenfield* case establishes the law of Illinois. But there is no known precedent in Utah. Hopefully a Utah court would reach the same result.

But just in case (and to give yourself the best chance of prevailing in case of a fight), your confessions to your clients should be limited to the facts. To the extent you can, relay all of the material facts without admitting legal liability. By all means don't say or do anything to suggest you are colluding with your clients to hang your insurer out to dry.

Better yet, get your insurer on board. Read your policy. Know and understand your reporting requirements under the policy. Call your broker if you have questions. Report potential claims early. Most insurers will respect an attorney's ethical obligations and will help you meet them. They can also provide valuable guidance on how to fix or minimize the problem.

Finally, listen to your insurer's advice, but don't allow the insurer to suck you into disclosing less than you are ethically obligated to disclose. As soon as you sense a conflict is beginning to develop, get outside help from an objective colleague. And trust in the court to protect you if your insurer plays heavy-handed.

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