

Mistakes: Confronting Lawyers' Worst Fears

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The North Carolina Bar Association Professional Vitality Committee creates sourced articles centered on reducing inherent stress and enhancing vitality in the lives of legal professionals and offers those resources as a benefit for members of the NCBA.

Concern about mistakes, or more precisely *the fear of mistakes*, is likely a part of your daily professional life. Potential pitfalls lurk everywhere. Really big ones, malpractice errors like missing a statute of limitations, can sidetrack a career. Have you ever overlooked a controlling case or key statute – what did the judge, or your client, think? Mistakes in performance can also be unnerving. Despite careful preparation, a lawyer may choke during a critical oral argument. Have you ever regretted asking a witness a question? Or not asking a question when you had a chance? You may make a tough judgment call that turns out to be wrong. The day is filled with opportunities for error. Most mistakes may prove to be relatively harmless. But not always. A key part of a lawyer's practice is finding responsibility for bad outcomes. Sometimes the responsibility arrow may be aimed at the lawyer. Lawyers must live with this concern – for most, it is an occupational fact of life, but for some, it is a burden that seriously interferes with or cripples professional performance.

Lawyer fears may begin in law school with the Socratic method, or grades which are totally dependent on one exam. And then, of course, there is the bar exam. The practice of law may be one's first encounter with hyper-aggressive or otherwise toxic personalities in an adversarial setting, or worse, in a supervisor. Typically, we are taught, and teach others, that fear must be lived with, or toughed

out – you'll get used to it. Lawyer fears may be described in a variety of ways, but most (or all) are ultimately the fear of mistakes. We don't want to appear foolish or incompetent, and we certainly don't want to cause a bad outcome.

In a fascinating, thoughtful and well-researched book, "Untangling Fear in Lawyering" (American Bar Association, 2019), attorney Heidi K. Brown tackles lawyers' fears comprehensively, and offers concrete advice for defusing that emotion. Her bibliography references other books and articles for further help. (Pages references herein are to Brown's book.) Brown's book is especially persuasive because of her own struggles with fear. She candidly describes her career challenges over two decades of difficult litigation and appellate practice, primarily focused on construction law. She ultimately has found professional satisfaction as a law school legal writing professor.

She rejects the "get over it" approach, or worse yet, the suggestion that maybe "you're just not cut out to be a lawyer," stigmatizing fear as a sign of weakness (81). She proposes "untangling fear" with a proactive, introspective approach to understand and tame its effects. She quotes from Marie Curie, "Nothing in life is to be feared. It is only to be understood" (97).

Brown describes the physical and mental components of

fear, which can impact an attorney in a variety of ways. Fear can interfere with learning, diminish creativity, and lead to mistakes (26-27). It can cause health issues (p28). She explains how the “fight or flight” instinct, which is automatic, can take away logic and lead to overreaction in stressful situations (71-75). Extremely stressful experiences can have lingering effects, recalled during later triggering events (p.75-76). Brown observes that one’s failure to address his own fears can impede the ability to perceive and respond to fear in others, including clients (37-38). Concealed fears can be the cause of an angry or aggressive personality (96). Perhaps most important, fear can result in resistance to growth, to new ideas or change (97).

She offers recommendations for individuals, law firms and the profession for reducing the impact of fear, and thus reducing mistakes. Obviously good work practices are a first step toward reducing mistakes, and there are numerous articles about “best practices” to be a more careful lawyer. You can’t reduce worries about mistakes if you don’t give your work the attention and commitment it requires. But Brown goes beyond that. Her main objective is a change in attitudes and culture, so that lawyers can address their fears and mistakes more openly and learn from those insights. She emphasizes that all lawyers make mistakes — we need to acknowledge that. Law is technically complicated, and becomes more so daily. For example, witness the problems often occurring with document production – Murphy’s law is alive and well (57). Too often, our profession discourages openness about mistakes, worries and their impact on performance and emotional well-being. Admitting fears is seen as a sign of weakness (24). Firms and lawyers must not bury such discussions. We should not insist that we are perfect, or that mistakes are signs of incompetence (56-57).

One cannot be an effective lawyer if driven by a need to avoid uncomfortable risks. Fear of showing ignorance may cause reluctance to seek help in complicated matters, or discourage important questions that might seem “dumb” (55,59). Fear of appearing weak may lead a lawyer to stick with a bad decision rather than admit a mistake (58), or try to fix a mistake alone, which sometimes can lead to ethical issues (64-65). A lawyer may exaggerate the possible consequences of an error, and overreact. It is important that cooler heads take over.

Thus, firms should have proactive plans for dealing with

mistakes, such as “safe harbor” rules providing protection to those who immediately report serious errors. Such disclosure enables the firm to respond to potential consequences rationally and reduces the likelihood that any harm may be compounded by attempts to cover up the problem (60). “Good attorneys distinguish themselves from bad ones, not in whether they make mistakes in complicated legal scenarios in the first place, but in how they handle legal errors. Obviously, we want to avoid and prevent mistakes, but the real strength in lawyering lies in navigating missteps when they occur” (60).

Brown encourages more than just mechanical changes, advising firms to hire lawyers with “character,” i.e., integrity, trustworthiness, conscientiousness and common sense, as well as legal competency (62). Citing “positive psychology” scholarship, she believes these traits are not simply innate, but can be taught, which firms should do (62-63).

Brown looks to other professions for ways to teach preparation for mistakes, and shift from a “culture of intimidation” to a “nonpunitive culture” (101-102). By acknowledging that mistakes, sometimes serious, do occur, professionals can address any harm rationally, and learn how better to avoid future errors. Health care professionals, journalists, engineers and others all face such fears of consequential mistakes, and many graduate schools have begun to address this in course work (101-112). Some business professors have stressed the need for acceptance of failure by prospective entrepreneurs, recognizing that adverse business decisions are a necessary component of learning (113).

Sports trainers may offer the best ideas for lawyers. Regardless of the sport, athletes face the constant fear of choking, of losing their confidence. Brown encourages working toward “eustress,” a state of stress that puts one “between our comfort zones and the fringe of our discomfort zones” (119, quoting from George Mumford). She sees this as an incremental process to prepare for challenging moments (114). Part of training, for an athlete or a lawyer, is to take on greater challenges, to build a greater tolerance to risk. Lawyers, like athletes, should pay greater attention to their own emotions during challenging moments, and learn to filter out negative reactions (121).

So what does all this look like? Brown offers checklists and

personal stories, but these seem to be key for individuals:

- “Train and trust.” Practice, simulate, rehearse. Plan ahead for problems. Like a fire drill, know in advance what you plan to do in response to expected problems (123-124). For example, if you know a deposition is going to be interrupted by an aggressive opponent, videotape the deposition. Let the deponent know that you may have to shut down the deposition.
- Avoid “catastrophizing.” Things rarely turn out as bad as you first fear (212). And don’t try to fix serious mistakes by yourself. Get help.
- Reinforce your confidence by drawing on past successes. Recall a past difficult problem that you worked through successfully without fear (149).
- Look objectively at past mistakes as lessons (115).
- Recall circumstances when fear of failure was greater than, logically, it should have been. Ask yourself why (150).
- Ask for help when you need it (203-208). (But Brown cautions that not all more seasoned attorneys will understand your concerns, so proceed carefully.)
- Pay attention to the physical side of lawyer performance. Relax. Smile. Stand up straight, with an open stance. Physically project confidence (125-126).
- Always be proactive. Anticipate fears (157-158). Recognize signs that fear of mistakes is affecting your

actions, and try to “reboot” (p.175-176).

- Perhaps most important, remain confident in your training, preparation and skill. Value your work. Don’t dwell on or exaggerate the possible downside of a mistake. Remember that your past successes were not accidental; you earned them (157-159).

Ultimately one should strive to build increased resilience by admitting, analyzing and learning from past mistakes (211-213), so that the practice of law can be a source of pride, enthusiasm and satisfaction (-215-217). Brown closes with a quote, from Shakespeare’s Henry VIII: “Things well done and with a care, exempt themselves from fear” (217).

The preceding article was researched, written, and reviewed as part of the work of the NCBA Professional Vitality Committee (PVC). The lead author was [George Evans](#) of Clearly Bespoke Strategies, Inc. (New Bern, N.C.). Please direct comments and suggestions to [Jamie Dean](#), Committee Chair, and [Holly Morris](#), Communities Manager. See more of the NCBA PVC compendium of articles and blog posts at nccbar.org/members/committees/professional-vitality/.

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