You may have heard the story about the lawyer who wanted to know how to live a good life. She heard of a guru in Nepal who could answer the question, and after spending weeks trekking, found the guru. The lawyer asked the guru, “How does a person live a good life?” After thoughtful silence, the guru answered, “Good judgment.”

The lawyer followed up with, “How do I learn good judgment?” After more reflection, the guru answered, “Bad judgment and the paradox of that from bad judgment and the pain of bad judgment, we learn good judgment rings true in my experience. Moreover, life offers abundant opportunities to learn good judgment from bad judgment starting with incidents like sticking a tongue on a swinging winter to colossally stupid decisions in junior high and high school in terms of risk assessment. I find both compassion and humility there if I offer any counsel to young people of that same age.

Marvin Windows general counsel Steve Tourek tells my law students each year that since life is too short to make every mistake and learn from each of them, we need to learn everything we can from the mistakes of others. One of the central themes in my Ethical Leadership courses is that leaders take responsibility for the mistakes of others. Among them are:

- guard against the first small intention-ally mistook, after all, it is easier to rationalize the next wrong; and
- face up to your mistakes (we all make them) and never try to cover up mistakes with false statements.

(Sheba’s list, “Top Ten List of Lessons Learned from White Collar Criminals,” can be found at www.stthomas.edu/ethi-calleadership.)

Self-rationalization

Shea counsels looking up to your mistakes, and in particular never making an affirmative lie cover up a mistake. The person making an affirmative lie knows it is a lie, but most people get stuck in self-rationalization that blinds them to the truth about their bad judgment and mistakes.

In “Mistakes Were Made (But Not by Me),” Carol Tavris and Elliot Aronson posit that we engage in a great deal of unconscious rationalization to avoid the cognitive dissonance of holding two clearly inconsistent positions. Such unconscious rationalization leads us to believe we are not actually lying.

My intuition is that lawyers are particularly vulnerable to self-rationalization since we are socialized principally as advocates, not counsellors.

In the advisor role, we focus on emphasizing the mistakes of others and minimizing our clients’ mistakes. We are trained to walk around any problem, put on the hat of each stakeholder and make all arguments meeting a minimum standard of good faith for that stakeholder’s position as an advocate.

While this skill of seeing all good-faith arguments from other perspectives in reflection on the lawyer’s own professional and personal bad judgments and mistakes. How does a person reduce the probability of unconscious self-rationalization to avoid the cognitive dissonance of bad judgment and mistakes?

The most important single step is to have at least one honest counselor and preferably, several of them. These are people who will give you the “independ-ent” judgment and the “candid,” honest and “straightforward” advice about unpleasant facts and alternatives that Minnesota Rule of Professional Conduct 2.1 directs us to provide to clients. Do you have a “board of honest and candid advisors for yourself?” Last the people who play this role in your professional and personal life. Ask each of them if they know and understand your hopes for them in this regard. A second step is to work on the habit and skill of asking first, when bad results occur from a decision, to what degree did I contribute to what went wrong?

In counseling clients and others to evaluate bad judgments and their conse-quences, the lawyer must develop active listening skills using empathetic understand- ing and reflecting and open-ended probing responses.

A useful open-ended question is some version of the “light of day” or “front page” of the newspaper” test. What will people think if everything becomes known? Would revealing mistakes honestly make lemonade out of a lemon to some degree?

People accept that we all make mistakes, it increases their trust if someone who exercises bad judgment takes responsibility to learn from and correct the mistake. It is critical not to make the
“The appellate courts, in the last five years or so, seem to be more willing to interfere with trial courts’ sanction awards,” said Minneapolis appellate attorney David Herr. “It seems that they’ve fallen into disfavor.” Minneapolis attorney Thomas Frazer said that many appellate awards appear to have fallen off since their peak in the mid-90s, when they are awarded they are looked at carefully.

“Appellate courts don’t automatically uphold sanction awards even through trial courts have wide discretion,” he said.

Three’s a charm
The three sources of authority for imposition of an attorney fee award are court rules, state statutes and a court’s “inherent authority” to make such an award.

According to Fraser, the last category was established by the U.S. Supreme Court in 1981 in Chambless v. NASCO. It’s a “catch-all” that is not used very often because it doesn’t need to be, he said.

“Sanction awards are few and far between,” Frazer said. “It should be the exceptional case where sanctions are awarded.”

Minneapolis appellate attorney Eric Magnuson said that, in particular, sanctions imposed under a court’s inherent power are closely scrutinized.

“Appellate courts look at the exercise of that power very carefully because it’s so undefined and nebulous,” he said. “They must be careful that it doesn’t get so undefined and nebulous.”

“Appellate courts don’t automatically uphold sanction awards even through trial courts have wide discretion.”

— Minneapolis attorney Thomas Frazer

Writing for the court, Judge David Mingel explained that Minnesota courts are reluctant to hold litigants accountable for the negligence or mistakes of their lawyers and have looked to the behavior of the individual client to determine whether such conduct justify the plaintiff and her attorney acted in bad faith and that many of the alleged violations of court orders by counsel were not support ed by the record and do not warrant a new trial. Thus, it was an error to sanction the plaintiff and her attorney for awarding the defendant attorney fees.

Frazer said that it makes sense that a decision to award attorney fees as a sanction should be closely examined. It may be due to the lawyer’s conduct without any authorization or guidance from the client, he said.

Practitioners say that in such a case, a fee award is rare. But an award of attorney fees may, in fact, be justified when a party to the action acts inappropriately.

In another recently issued unpublished decision, Brunette v. Brunette, the Court of Appeals found that an award of $22,500 in attorney fees was appropriate in a marital dissolution case, primarily because the husband’s conduct in delaying the sale of a home caused the wife to incur unnecessary fees.

Maplewood family law attorney Thomas W. Tuft said he’s gotten some fairly significant attorney fee awards based on the conduct of a party. He believes the sanction should apply in nearly every case involving contempt where it involves the violation of a previous court order.

“It’s expensive to fight a contempt motion,” Tuft pointed out. Just because attorneys request attorney fees doesn’t mean they will get them, however.

Tuft agreed, noting that most trial judges are careful in awarding fees as sanctions because it’s not necessarily a good way to fix problems that arise during the proceedings.

“Courts in Minnesota have always been reluctant to award sanctions, with some notable exceptions,” he said. “They are perm issions. They do cause problems.”

“The appellate courts are careful in awarding fees as sanctions because it’s not necessarily a good way to fix problems that arise during the proceedings.”

— Minneapolis attorney David Herr

“Courts are clearly paying more attention to the procedural aspects of sanctions.”

— Michelle Lore michelle.lore@minnlawyer.com

Learning from bad judgment and mistakes

Observations

Over the years or so, seem to be more willing to interfere with trial courts’ sanction awards,” said Minneapolis appellate attorney David Herr. “It seems that they’ve fallen into disfavor.”

In the long haul

When they’re not grooming prospective attorneys in law school, local firms find other ways of fighting the salary wars.

Some feel that awards of attorney fees should remain rare in for the long haul

Some revisit their pay scales in response to patterns in larger markets. For example, a set salary practice while others build merit and longevity bonuses into their starting salaries, so that a $120,000 associate’s salary can somehow be more significant within a few years.

But most are content with a hiring model that views those of this order as less expensive and more attractive to hiring superstars, and more on finding promising young lawyers who will place a priority on quality of work and quality of life.

“We haven’t had anyone say, ‘I’m going to stay on the East Coast because the salaries are higher there,’” said Thomas. “For the people we get, they feel we’re investing in them individually. It’s not just about money.”

Firms now recruiting law students

Salary

In 1980 we’re from national law schools, where only a small percent age are now, he said. Instead of greeting law school graduates with blank.</p>

February 18, 2008 • MINNESOTA LAWYER

Some feel that awards of attorney fees should remain rare

In the long haul

When they’re not grooming prospective attorneys in law school, local firms find other ways of fighting the salary wars.

Some feel that awards of attorney fees should remain rare

In the long haul

When they’re not grooming prospective attorneys in law school, local firms find other ways of fighting the salary wars.

Some feel that awards of attorney fees should remain rare