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Starting Right: Using Engagement Letters as a Risk Management Tool

By Mark J. Fucile
Fucile & Reising LLP

For a variety of reasons, lawyers' decisions today are increasingly being "second guessed" and the civil and regulatory consequences of "wrong" decisions are potentially more severe than in the past. One way lawyers can protect themselves in the face of these trends is "defensive lawyering"—managing your practice in a way that attempts to reduce civil and regulatory risk by documenting the key milestones in a representation. Engagement letters offer four key tools in defensive lawyering.

Defining the Client. At first blush, it might seem odd that you need to say who your client is. In many circumstances, however, you may be dealing with more than one person or entity as a part of the background context of a representation—multiple company founders, a developer and a property owner, one distinct part of a corporate group or several family members. In those situations it is important to make clear to whom your duties will—and will not—flow so that if the other people in the circle you are dealing with are disappointed later, they can't claim you were representing them too, and that you didn't protect them.

In Oregon, whether an attorney-client relationship exists in a particular circumstance is governed by the "reasonable expectations of the client" test set

out in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). The test is twofold: (1) does the client subjectively believe you are the client's lawyer? and (2) is that subjective belief objectively reasonable under the circumstances? Engagement letters allow you to set out clearly who your client will be in a given circumstance. Depending on the setting, polite "nonrepresentation" letters to those you will not be representing may also offer a useful supplement to an engagement agreement to let the nonrepresented parties know which side you are on. In the face of an engagement agreement with your client, conduct consistent with that agreement, and depending on the circumstances, nonrepresentation letters, it will be difficult for another party to assert that you were his or her lawyer too, under either element of the *Weidner* test. Defining who is being represented also benefits your client because it clarifies from the outset whom you will be looking to for strategic and tactical decisions on the "client side" of the relationship.

Defining the Scope of the Representation. Engagement letters offer an excellent opportunity to define the scope of a representation. As the law grows more complex, it is becoming more common for businesses and even some individuals to have more than one lawyer handle discrete aspects of their legal needs. If you are handling a specific piece of a client's work, it is prudent to set that out in the engagement letter. That way, you are less likely to be blamed later if another aspect of the client's work, that you were not responsible for, doesn't turn out to the client's liking.

Oregon RPC 1.2(b) allows a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” An engagement letter that outlines the scope of the services to be provided will go a long way toward meeting this requirement. It also benefits the client by fostering at the outset of the representation a conversation between the lawyer and the client concerning the client’s goals and the lawyer’s assessment of those goals.

Defining the scope of the representation can also offer a practical tool in managing conflicts by structuring the relationship in a way that eliminates conflicts in the first place. A conflict exists when the positions of multiple current or former clients are “directly” (to use the RPC 1.7 formulation for current clients) or “materially” (to use the RPC 1.9 terminology for former clients) “adverse.” If a representation is structured in a way that eliminates adversity between the positions of the clients involved, it may be possible to take on work that might otherwise have been precluded outright or that at the least would have required waivers. For example, a manufacturer and a distributor with consistent positions in a product liability claim might wish to hire the same lawyer to handle their defense more efficiently. By agreeing (among themselves and without the lawyer acting as an intermediary) to litigate any cross-claims for indemnity in a separate forum with separate counsel, the two clients may have effectively eliminated any potential conflict that would have precluded a single lawyer from defending both.

An engagement letter is the perfect place to document structural arrangements of this kind.

Documenting Conflict Waivers. Lawyers have important professional responsibilities for managing conflicts. *See generally* RPCs 1.7 (current client conflicts), 1.8 (lawyer self-interest conflicts) and 1.9 (former client conflicts). At the same time, conflicts of interest (or alleged conflicts of interest) can also present themselves in other litigation directed against lawyers—including disqualification, malpractice and breach of fiduciary duty claims. *See generally PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 278-288, 986 P2d 35 (1999) (disqualification); *Tydeman v. Flaherty*, 126 Or App 180, 187-88, 868 P2d 755 (1994) (malpractice); *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 144-48, 843 P2d 442 (1992) (breach of fiduciary duty). Given these risk factors, carefully documenting client consent to conflicts is important—both ethically and practically—and engagement letters offer an ideal time to do that.

Both RPC 1.7, which governs current client conflicts, and RPC 1.9, which controls former client conflicts, require that conflict waivers be confirmed in writing. Engagement letters that either include a conflict waiver or incorporate a separate standalone waiver protect both the lawyer and the client because they (1) document the disclosures that the lawyer made to the client and (2) confirm the basis upon which the client granted the waiver. *See generally In re*

Brandt/Griffin, 331 Or 113, 10 P3d 906 (2000) (discussing the content of conflict waivers under the former Oregon Code of Professional Responsibility). In that context, the more detailed the letter, the better—both from the perspective of fully explaining the issues involved to the client and increasing the likelihood that the client will be held to the waiver.

Documenting Rates and Mechanisms to Change Rates. An engagement letter is a great venue to both confirm existing rates and related charges for the work to be performed and to preserve your ability to modify those rates and charges during the course of the representation. When Oregon moved to the RPCs at the beginning of the year, it did not adopt the portion of ABA Model Rule 1.5(b) that, at least with new clients, requires an explanation of fees and expenses. Nonetheless, clearly communicating current rates can prevent misunderstandings with the client later. Further, specifically reserving the right to change those fees will generally avoid having to go back to the client for specific consent because the ability to modify the rate has been built-in up front.

In sum, engagement letters aren't an insurance policy. But in an environment in which lawyers' decisions are increasingly being "second guessed" and the consequences of "wrong" decisions can be significant, engagement letters are key tools in defensive lawyering.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.