

July 2008 WSBA *Bar News Ethics & the Law* Column

Defensive Lawyering (And Why It's Good for Both Lawyers & Clients)

**By Mark J. Fucile
Fucile & Reising LLP**

I recently did a series of law firm risk management classes with two lawyers who represent, respectively, claimants and lawyers in legal malpractice litigation and two others who prosecute and defend bar grievances. Despite their varying practice perspectives, they all shared a common theme: lawyers need to contemporaneously document key client decisions throughout the course of a representation. For lawyers, the documentation provides a clear record of advice given. For clients, that same documentation provides an equally clear channel for communications on the key aspects of the representation.

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: at the beginning; along the way; and at the end.

At the Beginning

Defensive lawyering should begin at the beginning. When you are taking on a client (or a new matter for an existing client), it is important to define who

your client will be and the scope of your representation, to confirm any necessary conflict waivers and to set out your compensation arrangements. Engagement letters offer an ideal venue for covering all four.

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 Washington, whether an attorney-client relationship exists in a particular circumstance is governed by a twofold test set out by the Supreme Court in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The first element is subjective: does the client subjectively believe you are the client's lawyer? The second element is objective: 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 *Bohn* 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.

RPC 1.2(c) allows a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” RPC 1.5(b) also requires lawyers to communicate the scope of the representation to clients. 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, breach of fiduciary duty, fee forfeiture and Consumer Protection Act claims: see, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999) (disqualification); *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (breach of fiduciary duty); *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) (fee forfeiture and CPA). 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. 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. The new version of RPC 1.5(b) adopted in 2006 requires an explanation of fees and expenses “preferably in writing.” (RPC 1.5(c) requires contingent fee agreements to be in writing.) Moreover, clearly communicating current rates can prevent misunderstandings with the client later. Finally, 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.

Along the Way

Even with the best of intentions and honorable motives, memories fade and recollections can vary from reality. Therefore, it is important to document important strategic and tactical decisions reached by the client during the course of a representation. The amount of the documentation will vary with the gravity of the decision involved. In many circumstances, however, the documentation need not be overly detailed. A quick email back to the client following a telephone call will often suffice. It is the contemporaneous record that will be important later. Confirming decisions with the client again fosters communication with the client and provides the client with a useful record of decision-making in the case as well.

At the End

The end of a representation may seem like an odd topic for defensive lawyering. With most matters, we know when we have come to the end of a

specific project—the advice sought has been given, the transaction has been closed or the final judgment has been entered. And, in some instances, the next work for a client flows seamlessly from one project to another. But at least in some situations, when we complete a project for a client we're not sure whether or not the client will be back even if we got a very good result. For example, we might have done a great job in a case for an out-of-state company, but that firm might have only very occasional operations here. In those situations, defensive lawyering becomes important in documenting the completion of the representation so that if circumstances change over time and another client asks us to take on a matter against that out-of-state company in my example, we aren't left wondering whether that company is a current client or a former client.

The distinction between classifying someone as a current or a former client is significant when it comes to the need for conflict waivers. *Current clients* have the right to object to *any* representation a lawyer proposes to take on adverse to them. This right flows from the broad duty of loyalty lawyers owe their current clients. *Former clients*, by contrast, have a much narrower right to object. Under RPC 1.9, former clients can only block an adverse representation by denying a conflict waiver when the new work is essentially the same or substantially related to the work the lawyer handled earlier for the former client or would involve using the former client's confidential information adverse to the

former client. Absent one of these two triggers, a lawyer is permitted to oppose a former client *without* seeking a waiver.

That's where defensive lawyering comes in. If you have completed a project for a client and you think it is relatively unlikely that you may see the client again, a polite letter thanking the client for the opportunity to handle the completed matter *and* letting the client know that you are closing your file may play a key role later in classifying the client as a former client. In the face of an "end of engagement letter," it will be difficult for a former client to argue later in the context of, most likely, a disqualification motion that the former client reasonably believed that you were still representing it.¹

Summing Up

Defensive lawyering isn'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, defensive lawyering can give you practical tools to reduce civil and regulatory risk. And, because it is built around the goal of clear communication with clients, lawyers shouldn't be defensive about 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.

¹ See, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055; *Jones v. Robanco, Ltd.*, CO3-3195P, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006) (unpublished).