July-August 2008 *Multnomah Lawyer Ethics Focus*

Defensive Lawyering Revisited: Part 3, Concluding the Representation

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This month we complete our look at "defensive lawyering"—managing your practice in a way that tries to reduce civil and regulatory risk by documenting the key milestones in a representation. In May, we focused on the beginning of a representation. In June, we examined defensive lawyering tools available during a representation. This last installment looks at concluding a representation.

At first blush, concluding 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. The next work for a client then often flows seamlessly from one project to another. At least in some situations, however, we may not necessarily see the client again 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. Alternatively, we may have handled a discrete matter for a company against which many of our other clients are often adverse. 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, in my examples, the out-of-state company or the company for whom we handled a discrete matter, we aren't left wondering whether the company is a current 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. The objection does not have to be either explained or even reasonable. This right flows from the broad duty of loyalty lawyers owe their current clients. And, as we discussed last month, under the "hot potato" rule, a lawyer cannot "fire" a current client to "cure" a conflict. *See* OSB Formal Ethics Op. 2005-11 at 2 n.1, citing *Unified Sewerage Agency v. Jelco*, 646 F2d 1339, 1345 n.4 (9th Cir 1981) (applying Oregon law).

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 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 those two triggers, a lawyer is permitted to oppose a former client *without* seeking a waiver. *See* OSB Formal Ethics Ops. 2005-11, 17 (discussing both kinds of former client conflicts). Stated a little differently, if one of those twin tests isn't met, we have a former client but *not* a former client conflict.

Although former client conflicts are waivable in theory, in practice most former clients will not grant waivers as, by definition, a former client conflict arises when the lawyer either "switches sides" in the same matter or wishes to use the former client's confidential information adverse to the former client. As a practical matter, if a true former client conflict exists, most lawyers will simply refer the matter to someone else rather than even ask a former client for this kind of 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 "end of engagement" 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 Oregon, whether a current attorney-client relationship exists is a two-part test: (1) does the client subjectively believe that you're his or her lawyer? and (2) is that subjective belief objectively reasonable under the circumstances? *See In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990); OSB Formal Ethics Op. 2005-146 (applying *Weidner*). In the face of an end of engagement letter (and conduct consistent with that letter), it will be difficult for a former client to argue later in the context of, most likely, a disqualification motion or a bar complaint that the former client reasonably believed that the lawyer was still representing the former client.

Beyond that, if you also used an initial engagement letter that clearly defined the scope of your representation, that defensive lawyering tool should also help distinguish the current matter in which you wish to oppose a former client from a past matter you handled for the former client. *See* RPCs 1.0(i) (defining "matter"), 1.9(d) (defining "substantially related"); *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 282-87, 986 P2d 35 (1999) (discussing former client conflicts under the analogous provisions of the former DRs). That, in turn, will allow you to demonstrate if questioned later that the current matter is not, to use RPC 1.9's term of art, "the same or substantially related" as an earlier matter handled for the former client and that it is, therefore, also improbable that you acquired any confidential information in the earlier representation that may be material to the current one.

As with all elements of defensive lawyering, an end of engagement letter, like an initial engagement agreement, is designed with the twin objectives of clearly communicating with the client and documenting those communications in a way that the lawyer can rely on later. Again as with all of the tools that we've discussed over the past three installments, lawyers shouldn't be defensive about defensive lawyering. We practice in an era where we are expected to make decisions quicker than in the past and those decisions are being second-guessed more often and by a wider spectrum of "on-lookers." In that context, clear

contemporaneous documentation of the key decisions made will benefit both clients and their lawyers both during the representation and later.

ABOUT THE AUTHOR

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