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Saying Goodbye: Documenting the End of a Representation

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

Lawyers often spend considerable energy on the front end of an attorney-client relationship—ranging from marketing to drafting their fee agreement. By contrast, the end of a representation frequently receives little attention beyond sending a final bill. In many instances, a key question left lingering is whether the client remains a current client or has become a former client. The distinction can have important practical consequences both in terms of our continuing duties to the client involved and our ability to take on new work that may be adverse to the client concerned. These practical considerations are heightened when the client may not necessarily be a “repeat customer.” In this ambiguous but comparatively common situation, it is particularly important to document the end of a representation. In this column, we’ll first look at the practical implications of the way we bring a matter to a close and then turn to the equally practical ways we can document the end of a representation to avoid problems later.

Practical Implications

Under the current client conflict rule, RPC 1.7, current clients have a very broad right to “veto” any proposed representation adverse to them for any reason—or no stated reason at all. This broad right is grounded in our fiduciary duty of loyalty to our current clients. Under the former client conflict rule, RPC

1.9, however, former clients have a much more constricted “veto” right because our continuing fiduciary duties are focused primarily on the specific matters we handled for them and the confidential information we acquired on those matters.

Determining whether a client falls into the “current” or “former” category turns largely on the client’s subjective belief that an attorney-client relationship exists and whether that subjective belief is objectively reasonable under the circumstances. This test, which the Court of Appeals in *Hipple v. McFadden*, 161 Wn.App. 550, 559, 255 P.3d 730 (2011), applied to the end of a relationship is similar to the standard the Supreme Court outlined in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), for defining the beginning of an attorney-client relationship. This is where documenting the end of a representation can play a critical role. If you’ve told a client (preferably in writing) that you’ve completed your work and are closing your file, it will be difficult for the client to credibly claim later that the client has a continuing subjective belief that you are still representing the client because that belief, even if true, will not be objectively reasonable under the circumstances.

Broadly put, failing to clearly demarcate the end of a representation can have two important practical consequences.

The first is that it can expose lawyers and their firms to civil and regulatory risk when taking on new matters adverse to people or entities that you or your firm have represented before.

Oxford Systems, Inc. v. CellPro, Inc., 45 F. Supp.2d 1055 (W.D. Wash. 1999), illustrates the civil risk. The law firm in *Oxford* had periodically—but not continuously—represented an out-of-state company on Washington matters over several years. The law firm had no active matters for the company when it then took on a case adverse to the company. The law firm, however, had not conclusively ended the relationship and the client asserted in a motion to disqualify that it had a continuing relationship with the firm. Absent clear documentation that the relationship had ended, the court disqualified the firm using the *Bohn* standard.

In re Egger, 152 Wn.2d 393, 98 P.3d 477 (2004), illustrates the regulatory risk. The law firm in *Egger* had represented a client on a bankruptcy claim against two debtors but was unable to recover the amount owed. The law firm later represented a second client in making a loan to the debtors to pay off the first client. The family of the second client, who was an elderly widow, sued the law firm asserting that it had mishandled her business affairs—including the loan. Her grandson also filed a bar grievance against the firm lawyer who did the loan work. The firm settled the civil suit and the lawyer was disciplined. In defending the disciplinary charge, the lawyer argued that the first client was no longer a current client at the time of the loan. The disciplinary hearing officer found, however, that there had been no definitive conclusion to the relationship and the first client was still shown as being a current client in the firm's conflict system at

the time of the loan work. The hearing officer recommended discipline and the Supreme Court concurred. In doing so, the Supreme Court used the *Bohn* test.

The second major practical consequence of failing to delineate the end of a representation is that it leaves lingering both our ongoing duties to a client and the limitation period for claims arising from past work.

On the former, as noted above, our remaining fiduciary duties to former clients are generally limited to the specific matters we handled for the former client and resulting confidential information we obtained. By contrast, we have many broad duties to our current clients ranging from loyalty to competence. In short, failure to document the end of a representation may continue to leave you responsible for things that occur (or don't occur) in the client's legal life (at least in those areas your work involved) because they may still be deemed to have taken place "on your watch."

On the latter, the statute of limitations for legal malpractice is generally three years—tempered by both a discovery rule and a "continuous representation" rule. The continuous representation rule tolls the limitation period as long as the lawyer (or firm) continues to represent the client on the matter involved (see *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn.App. 810, 819, 120 P.3d 605 (2005), for a detailed discussion of the contours of the rule). The primary issue on appeal in *Hipple* was the timeliness of the plaintiff's legal malpractice claim. The plaintiff argued that he continued to believe that two

lawyers whose work he claimed was negligent represented him until June 2006 when new counsel appeared. The two lawyers, by contrast, contended that their work had concluded in 2005. Plaintiff did not file his legal malpractice claim until June 2009, but argued that it remained timely under the continuous representation rule. The two lawyers moved to dismiss under the statute of limitation, but didn't have any documentation to rebut the plaintiff's contention that he continued to subjectively believe that they were representing him until June 2006. The trial court denied the lawyers' motion to dismiss and the Court of Appeals affirmed. In doing so, the Court of Appeals adopted the *Bohn*-like test for fixing the conclusion of a representation. *Hipple* provides apt illustration of how failing to clearly define the end of a representation can effectively extend the limitation period under the continuous representation rule.

Practical Solutions

The simplest practical solution is to send the client a "file closing" letter (or email) upon completion of a matter. The letter need not be either elaborate or off-putting. It can thank the client for the work while making clear that you are "closing your file" or something similar.

The letter or email needs to be sufficiently definite, however, to clearly convey that the work you agreed to do is done. In *Qwest Corp. v. Anovian, Inc.*, No. C08-1715RSM, 2010 WL 1440765 at *5-*6 (W.D. Wash. Apr. 8, 2010) (unpublished), for example, the court found that what appeared to be an interim

status report on one phase of a project before beginning another was not sufficient to constitute a documented end to an attorney-client relationship—or to prevent the disqualification of the lawyers who tried unsuccessfully to rely on it.

If you have indeed completed your work and told the client that (preferably in writing), it will be very difficult for the client to credibly argue later that the relationship continued. The Court of Appeals, citing *Bohn*, put it this way in affirming the denial of a disqualification motion in *State v. Siriani*, 103 Wn.App. 1054, 2000 WL 1867632 at *7 (2000) (unpublished): “When an attorney makes clear disclaimers regarding representation and does not act inconsistently with those disclaimers, such disclaimers may establish that the . . . [former client’s] subjective belief is unreasonable.”

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 NWLawyer (formerly 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.