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Defensive Lawyering Revisited: Part 1, Beginning the Representation

By Mark J. Fucile
Fucile & Reising LLP

Five years ago, I did a series of columns on "defensive lawyering." Then, as now, "defensive lawyering" means managing your practice in a way that tries to reduce civil and regulatory risk by documenting the key milestones in a representation. Then, as now, defensive lawyering has important benefits for both lawyers and clients. For lawyers, it provides a contemporaneous written record of how decisions were shaped if questioned later. For clients, it fosters clear communication on the central elements of a representation. The need for defensive lawyering has only grown since I wrote the original set of columns five years ago as a variety of "second guessers" ranging from disappointed clients to disaffected litigation opponents to regulatory authorities more intensively and routinely scrutinize lawyers' work after the fact. Meanwhile, the civil and regulatory consequences of "wrong" decisions have continued to accelerate across a spectrum ranging from civil claims for legal malpractice and breach of fiduciary duty to court-ordered remedies such as disqualification and fee forfeiture to regulatory discipline that includes suspension as the functional equivalent of bar-imposed monetary fines. Technology has also continued to accelerate the pace of our practices and, with that, puts us in situations more often where we need to make quick decisions that can have far reaching effects.

At the same time, the legal landscape here in Oregon has changed markedly in a number of ways since I wrote the original defensive lawyering columns. We have a new set of professional rules and an accompanying new set of formal ethics opinions from the Oregon State Bar. We have also seen important new decisions from Oregon's courts on lawyer civil liability like *Reynolds v. Schrock*, 341 Or 338, 142 P2d 1062 (2006). Given the sweep of these changes and the accelerating trends that led me to first write about defensive lawyering, I thought it would be a good time to revisit those themes. As we did five years ago, we will look at defensive lawyering in three monthly installments: at the beginning of a representation; midcourse; and at the end.

At the beginning of a representation, I cannot overstate the importance of engagement letters. They offer four key tools for "defensive lawyering."

First, engagement letters allow you to define who your client is. At first blush, it might sound odd that you need to say who your client will be in a given representation. In many circumstances, it will simply be the person sitting across the actual or "virtual" desk from you. In many other circumstances, however, it will not. Lawyers, for example, often initially meet with more than one person as a part of the background context of a representation, including multiple company founders, a developer and a property owner, one affiliate of a diverse 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 one of the other

people in the circle you are dealing with is disappointed later, that person can't claim that you were representing him or her, too, and you didn't do right by them. In this setting, polite "nonrepresentation" letters to those who you will not be representing should supplement your engagement agreement with your client to let the nonrepresented parties know precisely who you do and don't represent. The general rule in Oregon for determining whether a lawyer-client relationship exists was set out in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990), and has two parts. The first is subjective: does the client subjectively believe that the lawyer is representing him or her? The second is objective: is the client's subjective belief objectively reasonable under the circumstances? In the face of an engagement agreement clearly defining who the client is, accompanying nonrepresentation letters and conduct consistent with both, it will be very difficult for a nonclient to claim later that the lawyer was also representing him or her.

Second, engagement letters offer an excellent venue to define the scope of your representation. As the law continues to grow in complexity, 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 can be very useful to set that out in an engagement letter. In that way, you are less likely to be blamed later if another aspect of the client's work that you were not responsible for goes sour. 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. 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. An engagement letter is the perfect place to document structural arrangements of this kind. Another reason to document the scope of your work, especially with a client who you do not otherwise regularly represent and may be opposite in the future, is that it will help define what the "matter" was under the former client conflict rule if you or your firm do indeed find yourselves on the other side of a by then former client in the future.

Third, if you need a conflict waiver to undertake the work, you need to also document the client's consent up front. RPC 1.7(b)(4) requires that each client's consent (both the one being represented and the one being opposed) must be "confirmed in writing." This is not simply a regulatory requirement. Both the Oregon Supreme Court (*see, e.g.*, *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 142-44, 843 P2d 442 (1992)) and the Oregon Court of Appeals (*see, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 275-78, 986 P2d 35 (1999)), have noted that the fiduciary duty of loyalty underlies the regulatory duties expressed in the conflict rules. As such, an unwaived conflict translates very directly into a potential breach of fiduciary duty claim. When a conflict waiver is necessary, either weaving it into the engagement letter or

providing it as a stand-alone supplement offers a way to document both your disclosures to the client to be represented (along with a separate waiver letter to the client to be opposed) and the client's consent.

Fourth, an engagement letter is a great opportunity to confirm both your existing rates (and other charges) and to preserve your ability to modify your rates. (Some fee agreements, such as contingent fees for personal and property damage cases falling under ORS 20.340 and flat fees denominated as "earned upon receipt" governed by OSB Formal Ethics Opinion 2005-151 and associated court decisions, are required to be in writing.) Clearly communicating current rates can avoid misunderstandings with clients once bills come due. Moreover, reserving the right to change your rates in the future will generally avoid having to go back to the client for specific consent (as opposed to simple notice of adjustments) because the ability to modify the rate as time goes by was built-in up front. Absent that kind of mechanism, OSB Formal Ethics Opinion 2005-97 counsels that "[a] modification of a fee agreement in the lawyer's favor requires client consent based on an explanation of the reason for the change and its effect on the client." (*Id.* at 2.)

Engagement letters are not an insurance policy. But, they can offer key tools for 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.