

November 2003 *Multnomah Lawyer Ethics Focus*

Defensive Lawyering Part 1: Beginning the Representation

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

For a variety of reasons, lawyers' decisions are increasingly being second-guessed and the civil and regulatory consequences of "wrong" decisions are potentially more severe than in years past. In this month's column and the next two, I will discuss "defensive lawyering" as a way to protect yourself in the face of these trends. By "defensive lawyering," I mean managing your practice in a way that tries to reduce your civil and regulatory risk by documenting the key milestones in a representation. This month will focus on the outset of a representation, next month will look at issues that arise during a representation and the third installment will examine concluding a representation.

Defensive lawyering won't eliminate all risk. But, it can produce significant benefits for both you and your clients by fostering clear communication on the central elements of a representation.

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

First, they 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, however, you may be dealing with more than one person as a part of the background context of a representation—multiple company

founders, a developer and a property owner or several family members. In those situations, you need 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 didn't do right. 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 which side you are on.

Second, engagement letters offer a way to define the scope of the representation. As the law has grown in complexity, it is becoming common for businesses and even some individuals to have more than one lawyer to 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 the 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.

Third, if you need a conflict waiver to undertake the work, you should also document the client's consent up front. This is not only important in a regulatory sense, but can also protect you against a later breach of fiduciary duty claim from a disappointed client who contends that things didn't turn out as they should have because you had an undisclosed and/or unwaived conflict. Either weaving the waiver into the engagement letter or providing it as a stand-alone supplement

offers a way to document both your disclosures to the client and the client's consent.

Fourth, an engagement letter is a great opportunity both to confirm your existing rates and to preserve your ability to modify your rates as a representation progresses. Clearly communicating current rates can avoid many 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 because the ability to modify the rate as time goes by has been built-in up front.

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.