

September 2004 Idaho State Bar *Advocate*

Defensive Lawyering: Why Engagement Letters Are a Lawyer's Best Friend

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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 tries to reduce civil and regulatory risk by documenting the key milestones in a representation. Engagement letters offer four key tools for "defensive lawyering."

Defining the Client

At first blush, it might sound odd that you need to say who your client is. 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, one distinct part of a broader 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 look out for their interests.

In Idaho, whether an attorney-client relationship exists in a particular circumstance is a question of fact. See *Warner v. Stewart*, 129 Idaho 588, 593,

930 P.2d 1030 (1997) (“*Warner*”); accord *O’Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134 (Ct.App. 1990). The Supreme Court in *Warner* discussed twin tests for determining whether an attorney-client relationship exists: (1) what is the client’s subjective belief and is that subjective belief reasonable under the circumstances? and (2) was there some clear assent (either express or implied) to the representation by both the client and the lawyer? 129 Idaho at 593-94; see also *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 942-43, 854 P.2d 280 (Ct.App. 1993) (examining the question in contractual terms). Although the *Warner* court did not choose one test over the other, both tests contain a key element: regardless of the client’s *subjective* belief, that belief must be *objectively* reasonable. *Id.*ⁱ

Engagement letters allow you to set out clearly who your client will be in a given representation. Depending on the setting, polite “nonrepresentation” letters to those whom you will not be representing may also be 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, 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 under the *Warner* tests when, in fact, you were not.ⁱⁱ

Defining the Scope of the Representation

Engagement letters offer an excellent opportunity to define the scope of a representation.ⁱⁱⁱ As the law has grown in complexity, it is becoming more 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 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.

The Idaho Supreme Court has noted that “[t]he scope of an attorney’s contractual duty to a client is defined by the purposes for which the attorney is retained.” *Johnson v. Jones*, 103 Idaho 702, 704, 652 P.2d 650 (1982) (examining malpractice liability in terms of the scope of the tasks that the lawyer was hired to perform); *accord Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70 (1999) (quoting *Johnson* approvingly on this point in the context of a breach of fiduciary duty claim). When a lawyer is retained to handle a discrete task or matter, having an engagement letter that sets out the scope of that representation can be very useful later if other aspects of the client’s “legal life” for which the lawyer was not responsible fall into disrepair.

Defining the scope of a 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 only when the positions of the 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.” See *Idaho State Bar v. Frazier*, 136 Idaho 22, 29, 28 P.3d 363 (2001) (noting that no conflict existed under RPC 1.7 when the positions of two clients were aligned); *State v. Dye*, 124 Idaho 250, 258-59, 858 P.2d 789 (Ct.App. 1993) (finding no adversity—and, hence, no conflict—between the positions of current and former clients). 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 in a product liability claim might wish to hire the same lawyer to handle their defense more efficiently. By agreeing 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.^{iv} 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 in their practices. See *generally* Idaho 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, malpractice and breach of fiduciary duty claims. See, e.g., *Parkland Corp. v. Maxximum Co.*, 920 F. Supp. 1088, 1090-94 (D. Idaho 1996) (disqualification for former client conflict); *Johnson v. Jones, supra*, 103 Idaho at 704-07 (disposing on other grounds plaintiffs' contention that the defendant lawyer had committed malpractice by not disclosing conflicts); *Damron v. Herzog*, 67 F.3d 211, 213-16 (9th Cir. 1995) (applying Idaho law and discussing conflicts as a breach of a lawyer's fiduciary duty of loyalty to a client). Given these risk factors, carefully documenting client consent to conflicts is a key element in defensive lawyering and engagement letters offer an ideal vehicle to do that.^v

The recent amendments to the Idaho RPCs now require that waivers be confirmed *in writing* for current and former conflicts under, respectively, RPCs 1.7 and 1.9.^{vi} Engagement agreements that incorporate written conflict waivers are an important element in defensive lawyering 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.^{vii}

Documenting Rates and Mechanisms for Rate Changes

An engagement letter is an excellent venue both to confirm your existing rates and to preserve your ability to modify your rates as a representation progresses. Lawyers have a general duty under Idaho RPC 1.5 to communicate their fee structure to at least new clients when undertaking a matter. But, on a practical level, whether a lawyer is starting a new matter for either an existing or a completely new client, clearly communicating current rates can avoid many misunderstandings once bills begin to come due. Moreover, reserving the right to change 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.

Summing Up

Some engagement agreements—such as those involving contingent fees under RPC 1.5(c) or taking stock in lieu of fees under RPC 1.8(a)—*require* the client’s signature. Even when not required by the RPCs, however, it is still prudent to have the client countersign an engagement letter when it contains a conflict waiver or a particularly significant definition of the client or limitation on the scope of the representation that the lawyer may need to depend on later.

Engagement letters aren’t an insurance policy.^{viii} But, in an environment where lawyers’ decisions are increasingly being “second guessed” and the

consequences of “wrong” decisions can be significant, engagement letters offer key tools for defensive lawyering.

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ⁱ The subjective-objective test examined in *Warner* is used in the other Northwest states. See, e.g., *In re Weidner*, 310 Or. 757, 801 P.2d 828 (1990); *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992).

ⁱⁱ Defining the client is particularly important when representing individuals or family members. See, e.g., *Allen v. Stoker*, 138 Idaho 265, 266-69, 61 P.3d 622 (Ct.App. 2002) (finding that beneficiaries of an estate were not a lawyer's clients); *Harrigfeld v. Hancock*, ___ Idaho ___, 90 P.3d 884 (2004) (examining whether nonclient beneficiaries of a will had standing to assert a malpractice claim). It can often be equally important with corporate clients or insurers. See generally ABA Formal Ethics Op. 95-390 (1995) (addressing conflicts of interest in the "corporate family" context); Idaho State Bar Formal Ethics Opinion 136 (1999) (discussing insurance defense representation).

ⁱⁱⁱ Amended Idaho RPC 1.5(b) now requires, at least for new clients, that "[t]he scope of the representation . . . be communicated to the client . . . before or within a reasonable time after commencing the representation." The amended Idaho RPCs are available on the Idaho State Bar's web site at www.state.id.us/isb/rules/irpc.

^{iv} This also assumes that the two hypothetical defendants do not have inconsistent defenses. At the same time, jointly represented clients should be told as a part of the engagement agreement of the impact of the joint representation on the attorney-client privilege.

^v If conflicts develop later in a representation, it is equally important to document client consent to proceed with the issue arises.

^{vi} As noted earlier, the amended Idaho RPCs are available on the Idaho State Bar's web site at www.state.id.us/isb/rules/irpc.

^{vii} At least with clients sophisticated enough to understand them, future or "blanket" waivers are permitted even though all potential adverse representations cannot necessarily be described. See ABA Formal Ethics Op. 93-372 (1993); Comment 22 to amended Idaho RPC 1.7.

^{viii} On the subject of insurance, many malpractice insurers have engagement letter templates available for their policy holders' use.