

WHAT IS “DEFENSIVE LAWYERING,” AND WHY IS IT GOOD FOR BOTH LAWYERS AND CLIENTS?

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NOTES

I. INTERESTING TIMES

“May you live in interesting times.”
—Attributed to a Chinese proverb

Like the proverb, lawyers increasingly find themselves “living in interesting times.”

On one hand, a variety of forces—most prominently technological and economic—have combined to heighten the business and personal demands on lawyers.

A. Technology

Technological changes in the way we practice law are both a blessing and curse. They are a “blessing” in that advances like laptop computers, cell phones and “BlackBerry” pagers allow us to do our jobs more efficiently than ever before. At the same time, they are also a “curse” in the sense that increasingly clients expect (or lawyers perceive that clients expect) lawyers to make difficult tactical and strategic decisions in “real time” and on a “24/7/365” basis.

B. Economics

Economic changes both outside and inside law firms are causing lawyers to more aggressively pursue work than ever before. In terms of “outside” forces, nationwide consolidation in a variety of industries has reduced the pool of traditional “institutional” clients that once formed the core of many law firms’ practices. “Internal” forces ranging from rising billing expectations to more expensive cost structures have increased the pressure on lawyers to “produce” economically.

On the other hand, lawyers’ decisions are being more frequently “second guessed” and the consequences of their decisions have increased on both regulatory and civil liability fronts.

A few recent cases illustrate these trends.

II. DISCUSSION OF CASES

A. **More Stringent Conflict Waiver Standards: *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000)**

Brandt/Griffin grew out of the settlement of complex business tort litigation in which the two lawyers represented 49 clients against a franchisor of commercial automotive hand-tool distributorships, Mac Tools. After the two Oregon lawyers and several other plaintiffs' counsel from around the country handling similar claims had agreed to both the monetary and nonmonetary terms of a nationwide settlement on behalf of their clients, Mac Tools proposed hiring the lawyers upon completion of the settlements to advise it on how to correct the franchise tactics that had led to the lawsuits. Because the final settlement documents had not yet been executed by their clients at that point, the lawyers concluded that they should obtain conflict waivers from their clients under DR 5-101—which governs conflicts between a lawyer's personal financial interest and those of a client. The lawyers sent conflict waiver letters to their clients and incorporated the disclosure and consent provision into the clients' settlement agreements with Mac Tools as well.

Based on the recommendation in their conflict waiver letters to review the matter with independent counsel, one of the clients did. The independent counsel, who specialized in both business litigation and legal ethics, spent 20 hours over several days analyzing the waiver and conferring with both the client and one of the two lawyers. The additional discussions were confirmed by the lawyers to the independent counsel in writing as well. There was no dispute that the client understood the nature of the conflict. In fact, he and his independent counsel attempted to get the lawyers to waive their entire fee in return for the client's consent. When the lawyers refused, the client executed the settlement agreement containing the consent provision. But once he had pocketed the settlement payment, the client filed a bar complaint as a precursor to a later malpractice claim. In a 4-2 vote, the Oregon Supreme Court held that the conflict waiver was inadequate and, as such, the lawyers had proceeded with an unwaived conflict. It suspended the lawyers for, respectively, 13 and 12 months.

In doing so, the Supreme Court arguably rewrote four key elements of Oregon's definition of "full disclosure" under DR 10-101(B). *First*, although the "full disclosure"

rule on its face imposes a subjective test of whether the client understands the conflict involved, the majority appeared to interpret the requirement as imposing an objective standard. *Second*, although the majority recited the formalistic requirement that a conflict waiver letter contain a recommendation to seek independent counsel, it appeared to hold that the lawyer seeking the waiver gets no “credit” under DR 10–101(B) if the client follows the advice, obtains independent counsel, and further discussions with that independent counsel take place. *Third*, reflecting its objective standard and its view that a lawyer gets no “credit” for subsequent discussions or disclosures (to either the client or the independent counsel and whether in writing or not), the majority may have read a requirement into the rule that *all* disclosure be reflected in the *first* letter to the client. *Fourth*, again appearing to read a new requirement into the rule, the majority arguably found that the lawyer’s conflict waiver letter must not simply “confirm” (to use the rule’s term) that an oral disclosure and consent have taken place, it must also “corroborate” (to use the majority’s term) it in very specific detail.

The ultimate impact of *Brandt/Griffin* remains to be seen. Pending further direction from the Supreme Court, however, lawyers appear to be facing more stringent conflict waiver standards than the text of the Code of Professional Responsibility might otherwise suggest.

B. Increasing Scope of Breach of Fiduciary Duty Claims Against Lawyers: *Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999)

Granewich involved a corporate “squeeze out” where two shareholders in a closely held corporation allegedly amended the corporation’s bylaws to exclude a third shareholder and issued new shares to themselves to dilute the other’s influence. The minority shareholder who had been “squeezed out” brought a breach of fiduciary duty claim against the two majority shareholders *and* the corporation’s law firm. The minority shareholder asserted that the law firm had directly breached a fiduciary duty to him in his capacity as a corporate director and that the law firm was jointly liable for the majority shareholders’ breach of fiduciary duty. With both claims, the conduct involved preparing amendments to the corporate bylaws, handling the issuance of the additional stock and advising the majority shareholders on the removal of the minority shareholder from the board.

On appeal from an order dismissing the claims against the lawyers on the pleadings, the Oregon Supreme Court held that the minority shareholder had stated claims against the law firm. The Supreme Court concluded that the “proposition that one who knowingly aids another in the breach of fiduciary duty is liable to the one harmed thereby . . . readily extends to lawyers.” 329 Or at 57. Although *Granewich* was a “pleadings case” and, therefore, the underlying factual issues (such as whether the law firm was acting within the scope of its employment) were not before the Supreme Court, it has potentially far-reaching implications to Oregon business lawyers who advise closely held corporations.

C. Efforts to Extend Lawyer Liability Beyond Traditional Malpractice Boundaries: *Lord v. Parisi*, 172 Or App 271, 19 P3d 358 (2001); *Jeffries v. Mills*, 165 Or App 103, 995 P2d 1180 (2000); *Roberts v. Fearey*, 162 Or App 546, 986 P2d 690 (1999); *McComas v. Bocci*, 166 Or App 150, 996 P2d 506 (2000)

Lord, *Jeffries*, and *Roberts* all involved efforts to extend lawyer liability under tort theories to nonclients—a client’s business associate (and relative) in *Lord* and *Jeffries* and trust beneficiaries in *Roberts*. *McComas*, by contrast, was a contract action against a lawyer who allegedly made a guarantee of a particular result on an appeal. Neither the nonclients in the first three cases nor the client in the fourth succeeded.

The Court of Appeals in *Lord*, *Jeffries*, and *Roberts* all found that, generally, malpractice liability is limited to clients. At the same time, the Court of Appeals in all three noted that alternative theories *might* be available—if the attorneys in *Lord* and *Jeffries* had purported to act on behalf of the nonclients or if the attorney in *Roberts* had assisted in the trustee’s breach of a fiduciary duty to the beneficiaries. 172 Or App at 280 (*Lord*); 165 Or App at 114 (*Jeffries*); 162 Or App at 556 (*Roberts*).

In *McComas*, the Court of Appeals noted pointedly:

“If, as plaintiffs argue, a promise of appellate success was made in the context of defendant’s preexisting contractual undertaking, then it is unenforceable. A promise made after the creation of a contract and arising in the course of its performance is gratuitous and establishes no duty unless it is supported by new consideration.”

166 Or App at 156. But, the Court of Appeals also observed that if the promise of a specific result is a part of the consideration in forming the attorney-client relationship, then the failure to achieve that result *might* give rise to contractual liability independent of any negligence-based standard of care in handling the case. *Id.*; see, e.g., *Allen v. Lawrence*, 137 Or App 181, 185, 903 P2d 919 (1995) (holding that “[a]n attorney’s agreement to obtain a particular result” stated a claim for breach of contract when that result was not achieved).

D. Disqualification and the Use of Injunctions Against Lawyers: *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 986 P2d 35 (1999)

PGE involved two former in-house counsel who left the Portland utility in 1996 to join a law firm specializing in energy issues, Duncan Weinberg. One of Duncan Weinberg’s clients was a consortium of large industrial electricity customers, Industrial Customers of Northwest Utilities (ICNU). When the two former PGE lawyers began representing ICNU in the then-pending proceedings before the Public Utility Commission (PUC) over PGE’s merger with Enron, PGE objected on the ground that the lawyers’ advice on deregulation and associated cost recovery questions raised former client conflict questions under DR 5–105(C) because they had worked on those same issues while at PGE. The former in-house lawyers and PGE eventually “agreed to disagree” and later in 1996 entered into a “waiver agreement” that specified particular areas in which the former PGE lawyers were, and were not, permitted to work. Under that agreement, the former PGE lawyers could not provide advice adverse to PGE on “disaggregation” (splitting an integrated utility into separate companies focusing on separate functions, such as power generation and distribution) and “stranded cost recovery” (dealing with the recovery of prior investments in utility generating assets once deregulation occurred and those assets had a market value lower than their book value) encompassed within a proposed rate plan for industrial customers called “Schedule 77.” The former lawyers could, however, advise ICNU generally on disaggregation and stranded cost issues not connected with Schedule 77. In August 1997, PGE filed rate plans with the PUC dealing with aspects of disaggregation and stranded costs called the “Pilot Program” and the “Customer Choice Program.” The two former PGE lawyers began representing ICNU in the PUC proceeding.

Although the PUC has a disqualification procedure, PGE instead filed a lawsuit against the lawyers and Duncan Weinberg seeking a declaration that they were violating DR 5–105(C) and an injunction barring them from representing ICNU in the rate proceedings on the ground that the Pilot Program and the Customer Choice Program grew out of Schedule 77, and, therefore, were the same “matter.” The trial court granted the injunction. In doing so, the trial court found that all work relating to disaggregation and stranded costs constituted the same matter and, therefore, found a conflict under DR 5–105(C). Next, the trial court voided the waiver on its own motion as “unworkable.” It then barred the former in-house counsel from representing ICNU in the pending PUC proceeding and all other proceedings in which these issues might arise if they involved generating assets or contracts that the lawyers had dealt with while employed by PGE.

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals affirmed the portions of the trial court’s injunction that prohibited the lawyers from handling issues for ICNU that arose directly from either their work for PGE on Schedule 77 or their earlier work involving particular generating assets or contracts. The Court of Appeals reversed the broader prohibition on general advice regarding disaggregation and stranded costs. A 2–1 majority found that the new rate proceeding—although it dealt with issues of disaggregation and stranded costs—was not the same “matter” for conflicts purposes that the two lawyers had worked on while employed at PGE.

PGE illustrates the difficulty both lawyers and clients have in defining the term “matter” under the former client conflict rule. *See also In re McMenemy*, 319 Or 609, 879 P2d 173 (1994) (discussing—and debating—the breadth of the term “matter” as applied to former client conflicts); *see generally In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985) (outlining the general standards for former client conflicts). The former client conflict rule, DR 5–105(C), does not contain a definition of the term “matter.” In the absence of a rule-based definition, the broader the definition a particular court may employ potentially expands the range of disqualifying conflicts that lawyers face as well.

E. More Aggressive Challenges to Fee Collection Efforts: *Welsh v. Case*, 180 Or App 370, 43 P3d 445 (2002)

In *Welsh*, the plaintiff law firm had agreed to represent the defendant clients in negotiating an agricultural loan on an hourly basis with a \$1,500 advance fee deposit. After one of the clients' deposit checks bounced, the lawyer required a larger deposit before continuing. Still later, when the scope of services requested changed significantly, the lawyer sought and received promissory notes and a mortgage on the farm involved to secure payment of the law firm's fees. The clients never paid the notes, and the law firm brought a foreclosure action. The clients argued that the modification of the fee agreement was a business transaction within Oregon DR 5-104(A) and that, having failed to comply with the conflict waiver requirements of that rule, the law firm should be barred from recovering under the notes and mortgage because the law firm had supposedly breached a fiduciary duty to the clients. The trial court rejected the defense, and the Court of Appeals affirmed.

The Court of Appeals found that the professional "rules may illuminate a court inquiry into whether a breach of [fiduciary] duty owed by a lawyer to a client has occurred." 180 Or App at 382. The Court of Appeals, however, found that a fee modification should not be considered a "business transaction" with a client:

"The Supreme Court has explained that, under DR 5-104(A), the obligation to make full disclosure and obtain consent arises if: (1) a person with whom a lawyer has entered a business transaction was a client of the lawyer at the time of the transaction; (2) the attorney and the client have different interests in the transaction; and (3) the client expects the lawyer to exercise the lawyer's professional judgment in the transaction for the protection of the client. . . . Defendants cite no case, and we can find none, in which the 'business transaction' at the core of this rule is the fee arrangement between the lawyer and the client. Rather the cases apply the rule when a lawyer and a client have entered into a transaction that is unrelated substantively to the formation or structure of the lawyer-client relationship itself, for example when a lawyer arranges to borrow money from a client, . . . lend money to a client for a business venture, . . . or receive a gift from a client. . . . Although it is possible that the lawyer-client fee arrangement is a 'business transaction' and the lawyer's interests in it differ from the client's, . . . it is unlikely

that in negotiating a fee payment the client expects that the attorney is using his or her judgment for the protection of the client.”

Id. at 382–83 (citations omitted).

Because the clients had framed their breach of fiduciary duty defense solely around DR 5–104(A), the Court of Appeals did not address the application of DR 5–101(A)—which governs conflicts between the business or financial interest of the lawyer and the client. The Oregon State Bar in Legal Ethics Opinion 1991–97 (available on the Bar’s web site at www.osbar.org) found that under DR 5–101(A), “[a] modification of a fee agreement in the attorney’s favor requires client consent based upon an explanation of the reason for the change and its effect on the client.” Therefore, it is possible that the courts may have occasion to revisit this issue under DR 5–101(A).

III. DEFENSIVE LAWYERING

It is unrealistic to assume that the broader technological and economic forces in the marketplace will go away. It is also unrealistic to assume that the forces that are leading to lawyers’ decisions being more frequently “second guessed” will go away anytime soon either.

So what’s a lawyer to do?

My suggestion is “defensive lawyering.”

By “defensive lawyering,” I mean managing your practice in a way that attempts to reduce risks by documenting the key milestones in a representation. While there are potentially many actions a lawyer could take, I simply suggest three: (1) use engagement letters; (2) think of conflict waiver letters as your friends; and (3) document important client decisions in writing. These will not prevent all problems, nor will they eliminate all risks. But these simple steps can yield important returns. At the same time, they can produce significant benefits for your clients as well by promoting communication between the lawyer and the client on the central elements of the representation.

A. Use Engagement Letters

Engagement letters offer a lawyer—and the lawyer’s client—three significant benefits.

First, they assist in defining who is—and is not—the client. *See generally In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990) (defining the “reasonable expectations of the client test” for determining the existence of an attorney-client relationship). The Court of Appeals in *Lord* and *Jeffries* stressed in each instance that nonclients cannot generally bring claims for malpractice. *See* 172 Or App at 273–81 (*Lord*); 165 Or App at 105, 114 (*Jeffries*). Neither *Lord* nor *Jeffries* involved an engagement letter defining the client. *Id.* Although the lawyers prevailed on that issue in both cases, it was only after having to litigate through the appellate level. *Id.* By contrast, an engagement letter clearly defining who the client was would have allowed them to potentially eliminate that issue *before* it even became an issue. This is particularly the case when an attorney is only representing one of several actors in a given situation and some of those individuals remain unrepresented. *See generally* Mark J. Fucile, *Keeping Company: Managing Conflicts When Representing Start-ups in Good Times and Bad*, 62 OREGON STATE BAR BULLETIN 15 (April 2002). (In that instance, the lawyer may also wish to send the nonclients a “nonrepresentation letter” specifically confirming that the lawyer is *not* representing them. *Id.* at 17.) Defining “who” is being represented also benefits the client because it clarifies from the outset to whom the lawyer should look for strategic and tactical decisions on the “client side” of the relationship.

Second, an engagement letter offers an excellent opportunity to both confirm existing rates and related charges for the work to be performed *and* to preserve the lawyer’s ability to modify those rates and charges during the course of the engagement. Clearly communicating current rates can avoid misunderstandings with clients concerning the basis of the fees eventually charged. Further, specifically reserving the right to change those fees in the future will generally avoid having to go back to the client for specific consent because the ability to modify the rate has been addressed with the client in advance. *See* OSB Legal Ethics Op 1991–97 at 2 (“A modification of a fee agreement in the attorney’s favor requires client consent based upon an explanation of the reason for the change and its effect upon the client.”).

Third, engagement letters offer an opportunity to define the scope of the representation. This can be particularly critical when a lawyer is being hired to perform a discrete task or to handle a specific case. For example, a lawyer who is being retained to perform the legal side of an environmental audit for one site that is involved in a multiple-property real estate transaction being handled overall by another firm would be wise to define the limited scope of that role in an engagement letter. In that way, both the lawyer and the client are clear on what the lawyer is, and is not, responsible for in the transaction. Further, although contract claims against lawyers are relatively rare compared to more conventional tort-based theories, *McComas* illustrates that they are not unknown. An engagement letter that outlines at least generally the scope of services (without making any guarantees of specific results) will be inexpensive insurance against a contract-based claim. Defining the scope of the engagement also fosters a “conversation” between the lawyer and the client at the outset of the representation concerning the client’s goals and the lawyer’s assessment of those goals.

B. Think of Conflict Waiver Letters as Your Friends

Unlike engagement letters, conflict waivers are *required* when necessary. And, in Oregon, conflict waivers must also contain very specific elements to be effective—including being in writing and containing a recommendation to seek independent counsel. See DR 10–101(B); *In re Brandt/Griffin, supra*, 331 Or 113. Although writing conflict waiver letters can seem like a burden, they can be your friends in two important ways.

First, a thorough conflict waiver letter benefits both the client *and* the lawyer. See generally Peter R. Jarvis, Mark J. Fucile, and Bradley F. Tellam, *Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters*, 62 OREGON STATE BAR BULLETIN 29 (June 2002). It benefits the client by communicating the grounds upon which the waiver was granted. It benefits the lawyer for precisely the same reason. *Id.* If anyone later questions the lawyer on the conflict, the lawyer in defense will be able to point to an exact record documenting the client’s consent.

Second, although conflict waivers are certainly important in a disciplinary sense, they can be very useful tools in defending (or hopefully foreclosing) a breach of fiduciary duty claim as well. *Id.* As the Court of Appeals in *Welsh* noted: “[T]he

disciplinary rules may illuminate a court’s inquiry into whether a breach of [fiduciary] duty owed by a lawyer to a client has occurred.” 180 Or App at 382 (citing *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 142, 843 P2d 442 (1992)). In other words, while the failure to obtain a conflict waiver in and of itself does not give rise to a private cause of action, it can form the core of a breach of fiduciary duty claim. *Id.*

C. Document Important Decisions by the Client

Even with the best of intentions and honorable motives, memories fade and recollections can be different than reality. Therefore, it is important to document key strategic and tactical decisions reached by the client during the course of a representation. The documentation need not necessarily be elaborate or overly detailed. Although the significance of the decision in the context of the case or transaction will dictate the level of detail involved, a quick e-mail to the client following a telephone call, a reply e-mail, or even a phone note or short file memo will often suffice. It is the contemporaneous record that will be important later. Confirming key decisions with the client again fosters communication with the client and provides the client with a useful record of decision-making in the case as well. Copying clients on all correspondence serves the same useful purposes—for both the lawyer and the client. The lawyer will have contemporaneously informed the client how agreed strategy is being implemented, and the client will have the opportunity to raise any questions immediately as well.

IV. CONCLUSION

Lawyers shouldn’t be defensive about “defensive lawyering.” It is built around the client-centered principle of clear communication between the lawyer and the client in defining objectives, agreeing on fee structures, and keeping the client informed of progress on the matter involved. At the same time, it protects the lawyer by setting out in writing (whether on paper or electronically) the fundamental facets of the lawyer-client relationship, such as who the client is, what the scope of the representation is to be, how the lawyer will be compensated, what the client’s key decisions were, and how they were implemented. In these “interesting times” in which we practice, having these central elements documented benefits both the lawyer and the client.

NOTES