

PROFESSIONALISM & ETHICS: DEFENSIVE LAWYERING

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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 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 is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He received his B.S. from Lewis & Clark College and his J.D. from UCLA.

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January 2004 Multnomah Lawyer Ethics Focus Column

Multnomah Lawyer Ethics Focus columns are on the web at www.mbabar.org. The columns included for today’s course materials, together with Mark’s others on legal ethics, the attorney-client privilege and law firm risk management are also available in the Resources Section of Fucile & Reising LLP’s web site at www.frllp.com.

The columns included in these materials were written when the former Oregon Rules of Professional Responsibility, or “DRs,” were still in effect. They were replaced by the Rules of Professional Conduct effective January 1, 2005 and the accompanying Oregon State Bar formal ethics opinions were updated later that year to reflect the new RPCs. The three-column “defensive lawyering” series will be updated later this year in the Multnomah Lawyer. As is reflected in the original series, however, they focus primarily on general principles of law firm risk management rather than specific professional rules.

“Defensive Lawyering, Part 1: Beginning the Representation”

Mark J. Fucile

November 2003 Multnomah Lawyer Ethics Focus Column

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 overstate 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.

“Defensive Lawyering Part 2: During the Representation”

Mark J. Fucile

December 2003 Multnomah Lawyer Ethics Focus Column

Last month, we started looking at what I call “defensive lawyering”—managing your practice in a way that tries to reduce your civil and regulatory risk by documenting the key milestones in a representation. Last month’s column focused on the outset of a representation. Next month, we’ll look at concluding a representation. This month, we’ll examine two areas that can arise during a representation where “defensive lawyering” applies: documenting major client decisions and modifying fee agreements midstream.

Documenting Major Client Decisions. When we begin a new matter, we all hope that that it will produce a good result for the client and that the client will appreciate the skill and hard work that went into obtaining that good result. At the same time, we also know that not all representations turn out that way for a variety of reasons. Sometimes the reason is that the client made a major decision against our advice or took a calculated risk that didn’t play out. In those instances, it is important to document who made the call that produced that result. Even with the best of intentions and honorable motives, memories fade and recollections can vary from reality. It’s also human nature to “second-guess” when things go sour. In the absence of clear documentation, some of that second-guessing may be pointed in the lawyer’s direction.

Documenting key client decisions need not necessarily be elaborate or overly detailed. Although the significance of the client’s decision in the context of a particular 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 a time sheet entry will often suffice. It is the contemporaneous record that will be important later. Confirming key decisions with the client also fosters clear communication between the lawyer and the client. Copying clients on all correspondence serves that same useful purpose—both for 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.

Modifying Fee Agreements. As I discussed last month, the best time to deal with fee modifications is at the outset of a representation by building a mechanism for periodic adjustment into your engagement agreement with the client. But, sometimes that hasn't happened or the nature of the modification involved is beyond the scope of the mechanism included in the engagement agreement. Once an attorney-client relationship has been formed, a lawyer's ability to bargain with a client over the financial aspects of the arrangement is constrained by the lawyer's fiduciary duty to the client.

The Oregon Court of Appeals held last year in *Welsh v. Case*, 180 Or App 370, 382-83, 43 P3d 445 (2002), that a fee modification generally does *not* constitute a "business transaction" between the lawyer and the client as the professional rules use that term. By excluding at least fee modifications involving rate adjustments and the like from the definition of "business transactions," the enhanced client consent requirements for such transactions do not apply. At the same time, the Oregon State Bar has also counseled that client consent must still

be obtained when fee modifications are in the lawyer's favor. Legal Ethics Opinion 1991-97 (available on the Bar's web site at www.osbar.org) concludes that "[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." Although Legal Ethics Opinion 1991-97 does not use the phrase "in writing," it's wise to confirm modifications in writing to avoid any misunderstandings later.

“Defensive Lawyering Part 3: Concluding the Representation”

Mark J. Fucile

January 2004 Multnomah Lawyer Ethics Focus Column

This month, we complete our look at “defensive lawyering”—managing your practice in a way that tries to reduce your civil and regulatory risk by documenting the key milestones in a representation. In November, we focused on the beginning of a representation. Last month, we examined defensive lawyering tools available during a representation. This last installment looks at concluding a representation.

At first blush, concluding a representation may seem like an odd topic for defensive lawyering. With most matters, we know when we have come to the end of a specific project—the advice sought has been given, the transaction has been closed or the final judgment has been entered. And, in some instances, the next work for a client flows seamlessly from one project to another. But at least in some situations, when we complete a project for a client we’re not sure whether or not the client will be back even if we got a very good result. For example, we might have done a great job in a case for an out-of-state company, but that firm might have only very occasional operations here. In those situations, defensive lawyering becomes important in documenting the completion of the representation so that if circumstances change over time and another client asks us to take on a matter against that out-of-state company in my example, we aren’t left wondering whether that company is a current client or a former client.

The distinction between classifying someone as a current or a former client is significant when it comes to the need for conflict waivers. *Current clients* have the right to object to any representation a lawyer proposes to take on adverse to them. This right flows from the broad duty of loyalty lawyers owe their current clients. *Former clients*, by contrast, have a much narrower right to object. Under DR 5-105(C)-(D), former clients can only block an adverse representation by denying a conflict waiver when the new work is essentially the same or significantly related to the work the lawyer handled earlier for the former client or would involve using the former client's confidential information adverse to the former client. Absent one of these two triggers, a lawyer is permitted to oppose a former client *without* seeking a waiver.

That's where defensive lawyering comes in. If you have completed a project for a client and you think it is relatively unlikely that you may see the client again, a polite letter thanking the client for the opportunity to handle the completed matter *and* letting the client know that you are closing your file may play a key role later in classifying the client as a former client. In Oregon, whether a current attorney-client relationship exists is a two-part test: (1) does the client subjectively believe that you're his or her lawyer? and (2) is that subjective belief objectively reasonable under the circumstances. See *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990); OSB Legal Ethics Op. 1996-146. In the face of an "end of engagement letter," it will be difficult for a former client to argue later in the context of, most likely, a disqualification motion that the former client reasonably believed that you were still representing it.

As with all elements of defensive lawyering, an end of engagement letter is designed with the twin objectives of clearly communicating with the client and documenting those communications in a way that the lawyer can rely on later.