

CHAPTER 12

**ETHICS FOR
THE SOLO AND SMALL FIRM PRACTITIONER**

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I. DEFENSIVE LAWYERING

(And Why It's Good for Both Lawyers and Clients)

(Reprinted from Mark's July 2008 Ethics & the Law column in the WSBA *Bar News*)

I recently did a series of law firm risk management classes with two lawyers who represent, respectively, claimants and lawyers in legal malpractice litigation and two others who prosecute and defend bar grievances. Despite their varying practice perspectives, they all shared a common theme: lawyers need to contemporaneously document key client decisions throughout the course of a representation. For lawyers, the documentation provides a clear record of advice given. For clients, that same documentation provides an equally clear channel for communications on the key aspects of the representation.

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 attempts to reduce civil and regulatory risk by documenting the key milestones in a representation: at the beginning; along the way; and at the end.

At the Beginning

Defensive lawyering should begin at the beginning. When you are taking on a client (or a new matter for an existing client), it is important to define who your client will be and the scope of your representation, to confirm any necessary conflict waivers and to set out your compensation arrangements. Engagement letters offer an ideal venue for covering all four.

Defining the Client. At first blush, it might seem odd that you need to say who your client is. In many circumstances, however, you may be dealing with more than one person or entity as a part of the background context of a representation—multiple company founders, a developer and a property owner, one distinct part of a 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 protect them.

In Washington, whether an attorney-client relationship exists in a particular circumstance is governed by a twofold test set out by the Supreme Court in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The first element is subjective: does the client subjectively believe you are the client's lawyer? The second element is objective: is that subjective belief objectively reasonable under the circumstances? Engagement letters allow you to set out clearly who your client will be in a given circumstance. Depending on the setting, polite "nonrepresentation" letters to those you will not be representing may also offer 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 with your client, 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, too, under either element of the *Bohn* test. Defining who is being

represented also benefits your client because it clarifies from the outset whom you will be looking to for strategic and tactical decisions on the “client side” of the relationship.

Defining the Scope of the Representation. Engagement letters offer an excellent opportunity to define the scope of a representation. As the law grows more complex, 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 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.

RPC 1.2(c) allows a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” RPC 1.5(b) also requires lawyers to communicate the scope of the representation to clients. An engagement letter that outlines the scope of the services to be provided will go a long way toward meeting this requirement. It also benefits the client by fostering at the outset of the representation a conversation between the lawyer and the client concerning the client’s goals and the lawyer’s assessment of those goals.

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. A conflict exists when the positions of 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.” 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 with consistent positions in a product liability claim might wish to hire the same lawyer to handle their defense more efficiently. By agreeing (among themselves and without the lawyer acting as an intermediary) 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. 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. *See generally* 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, breach of fiduciary duty, fee forfeiture and Consumer Protection Act claims: *see, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999) (disqualification); *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (breach of fiduciary duty); *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) (fee forfeiture and CPA). Given these risk factors, carefully documenting client consent to conflicts is important—both ethically and practically—and engagement letters offer an ideal time to do that.

Both RPC 1.7, which governs current client conflicts, and RPC 1.9, which controls former client conflicts, require that conflict waivers be confirmed in writing. Engagement letters

that either include a conflict waiver or incorporate a separate standalone waiver protect both the lawyer and the client 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.

Documenting Rates and Mechanisms to Change Rates. An engagement letter is a great venue to both confirm existing rates and related charges for the work to be performed and to preserve your ability to modify those rates and charges during the course of the representation. The new version of RPC 1.5(b) adopted in 2006 requires an explanation of fees and expenses “preferably in writing.” (RPC 1.5(c) requires contingent fee agreements to be in writing.) Moreover, clearly communicating current rates can prevent misunderstandings with the client later. Finally, reserving the right to change those fees will generally avoid having to go back to the client for specific consent because the ability to modify the rate has been built-in up front.

Along the Way

Even with the best of intentions and honorable motives, memories fade and recollections can vary from reality. Therefore, it is important to document important strategic and tactical decisions reached by the client during the course of a representation. The amount of the documentation will vary with the gravity of the decision involved. In many circumstances, however, the documentation need not be overly detailed. A quick email back to the client following a telephone call will often suffice. It is the contemporaneous record that will be important later. Confirming 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.

At the End

The end of 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 RPC 1.9, former clients can only block an adverse representation by denying a conflict waiver when the new work is essentially the same or substantially 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 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.

Summing Up

Defensive lawyering isn't an insurance policy. But in an environment in which lawyers' decisions are increasingly being "second guessed" and the consequences of "wrong" decisions can be significant, defensive lawyering can give you practical tools to reduce civil and regulatory risk. And, because it is built around the goal of clear communication with clients, lawyers shouldn't be defensive about defensive lawyering.

II. CHANGING HORSES IN MIDSTREAM: MODIFYING FEE AGREEMENTS

(Reprinted from Mark's December 2010 Ethics & the Law column in the *WSBA Bar News*)

Regardless of the compensation method used, lawyers often spend considerable time before taking on representations negotiating their fee agreements with clients. In most instances, the lawyer and the client reach agreements that both understand and are performed without event. Sometimes, however, lawyers later attempt to modify fee agreements in their favor. The reasons are many and range from rates increasing during the duration of the matter involved to fundamental changes in the assumptions upon which the representation was predicated. In still others, the lawyers simply conclude they didn't negotiate a very good deal at the beginning and would like a bigger piece of the "pie."

In this column, we'll first briefly survey the law governing fee modifications. We'll then turn to practical steps that can be taken in the beginning to anticipate and provide for contingencies which may develop over the course of a matter. We'll conclude with some cautionary notes about what can happen when lawyers simply try to impose unilateral modifications later.

Fee Modifications Generally

Washington's law of lawyering sets a very high bar for enforceable fee modifications. Division 1 of the Court of Appeals summarized these standards in *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 428-29, 432, 754 P.2d 120 (1988):

"Review of an attorney's fee agreement renegotiated after the attorney-client relationship was established requires particular attention and scrutiny. . . Such modification is considered to be void or voidable until the attorney establishes 'that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated.'

...

"A fee agreement modified to increase an attorney's compensation after the attorney is employed is unenforceable if it is not supported by new consideration."
(Citations omitted.)

Washington's rigorous approach rests on three legs. First, once formed, an attorney-client relationship is a fiduciary one as a matter of law. Second, the Rules of Professional Conduct, including RPC 1.7(a)(2), impose parallel duties when there is a conflict between the business interests of the lawyer and client. Third, fee agreements—and subsequent amendments—are subject to standard contract principles.

Ward was a contingent fee case. The standards noted, however, apply with equal measure to *all* fee agreements regardless of the particular compensation method involved. In *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 109 Wn. App. 436, 988 P.2d 467 (1999), *amended*, 109 Wn. App. 436, 33 P.3d 742 (2000), for example, Division 1 used these principles

in an hourly fee context to decide whether there had been “full revelation” necessary for an accord and satisfaction when billing rates were changed without notice to the client. Similarly, these standards apply to modifications beyond the dollar terms of a fee agreement. In *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007), for example, the Supreme Court applied these principles when addressing foreclosure of a trust deed that had been added by way of modification to secure unpaid fees in an ongoing matter.

Practical Steps to Avoid Problems

Ward and its companion cases don’t say that lawyers may never renegotiate fees—just that any resulting modifications will be closely scrutinized and may be unenforceable if they don’t meet the high standards noted. Given that risk, the practical point for anticipating and addressing possible change is in the *original* fee agreement. When contingencies for change are wired into the original fee agreement, they aren’t “modifications.” Rather, they are circumstances that were disclosed, bargained-for and supported by consideration before the fiduciary duties inherent in the attorney-client relationship attached.

Providing a mechanism for periodic hourly rate adjustments or for a higher contingent fee on appeal are ready examples of monetary provisions that can be anticipated and included at the outset. Reserving an advance fee deposit for later in a case, such as 90 days before trial, is an equally ready example of a non-monetary provision that can also be included in an original agreement. The key is that these provisions were agreed by the client and the lawyer at the beginning of the representation rather than imposed unilaterally by the lawyer later.

Like all contracts, ambiguity in fee agreements is generally construed against the drafter—which is usually the lawyer. When including contingencies in a fee agreement, therefore, they need to be clear in both their scope and triggering events. Beyond formal rules of construction, lawyers also need to be sensitive to the practical consideration that a reviewing court may not cut much slack for a lawyer-drafter who failed to address an ambiguity.

Consequences

Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878 (2002), is an extreme but useful example of the range of consequences possible when a lawyer falls short of the standards discussed. The lawyer in *Cotton* took on a criminal case at an hourly rate, with the fee secured by land and a trailer the client owned. A few days later, however, the lawyer changed the agreement to a flat fee and took the land and the trailer in exchange. There was no new consideration for the amendment. The lawyer was later disqualified after he paid the prosecution’s key witness for his silence and bought the witness a one-way ticket out of town (both apparently unbeknownst to the client). Despite his disqualification, the lawyer refused to refund the fee. The client sued. Following cross-motions for summary judgment, the case went to Division 1 of the Court of Appeals.

The Court of Appeals found that the lawyer’s modification breached his fiduciary duty to the client and violated the RPCs. It also noted the lack of new consideration. As a result, the Court of Appeals held that the modification was unenforceable. It also concluded that the trial

court had the discretion to direct the lawyer to return all fees collected under the circumstances rather than allowing the lawyer to retain a portion under quantum meruit (*see generally Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) on fee disgorgement). Because the agreement involved the business aspects of the lawyer's practice, the client also brought a Consumer Protection Act claim against the lawyer (*see generally Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984) on CPA claims relating to law practice) and sought fees in the refund litigation under the CPA. Although the Court of Appeals found that fact issues precluded summary judgment on that claim, it did not reject the legal basis for that potential additional remedy and remanded the CPA claim for further proceedings. The lawyer was eventually disbarred for the witness-tampering in the underlying criminal case (*In re Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005)).

Not every fee modification will involve *Cotton's* toxic stew. *Cotton* does, however, offer a stark example of the range of remedies potentially available to clients when fee modifications are disputed. Those remedies, moreover, are equally available to a client contesting a fee collection action by a lawyer as they are in the context of a lawsuit by a client against the lawyer.

Summing Up

Fee issues can become flashpoints in an attorney-client relationship. The simplest way to avoid potential problems from modifications is to incorporate likely contingencies into the original fee agreement using terms that are clear in their scope and triggering events.

III. SAYING GOODBYE: DOCUMENTING THE END OF A REPRESENTATION

(Reprinted from Mark's March 2013 Ethics & the Law column in the WSBA *Bar News*)

Lawyers often spend considerable energy on the front end of an attorney-client relationship—ranging from marketing to drafting their fee agreement. By contrast, the end of a representation frequently receives little attention beyond sending a final bill. In many instances, a key question left lingering is whether the client remains a current client or has become a former client. The distinction can have important practical consequences both in terms of our continuing duties to the client involved and our ability to take on new work that may be adverse to the client concerned. These practical considerations are heightened when the client may not necessarily be a “repeat customer.” In this ambiguous but comparatively common situation, it is particularly important to document the end of a representation. In this column, we’ll first look at the practical implications of the way we bring a matter to a close and then turn to the equally practical ways we can document the end of a representation to avoid problems later.

Practical Implications

Under the current client conflict rule, RPC 1.7, current clients have a very broad right to “veto” any proposed representation adverse to them for any reason—or no stated reason at all. This broad right is grounded in our fiduciary duty of loyalty to our current clients. Under the former client conflict rule, RPC 1.9, however, former clients have a much more constricted “veto” right because our continuing fiduciary duties are focused primarily on the specific matters we handled for them and the confidential information we acquired on those matters.

Determining whether a client falls into the “current” or “former” category turns largely on the client’s subjective belief that an attorney-client relationship exists and whether that subjective belief is objectively reasonable under the circumstances. This test, which the Court of Appeals in *Hipple v. McFadden*, 161 Wn.App. 550, 559, 255 P.3d 730 (2011), applied to the end of a relationship is similar to the standard the Supreme Court outlined in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), for defining the beginning of an attorney-client relationship. This is where documenting the end of a representation can play a critical role. If you’ve told a client (preferably in writing) that you’ve completed your work and are closing your file, it will be difficult for the client to credibly claim later that the client has a continuing subjective belief that you are still representing the client because that belief, even if true, will not be objectively reasonable under the circumstances.

Broadly put, failing to clearly demarcate the end of a representation can have two important practical consequences.

The first is that it can expose lawyers and their firms to civil and regulatory risk when taking on new matters adverse to people or entities that you or your firm have represented before.

Oxford Systems, Inc. v. CellPro, Inc., 45 F. Supp.2d 1055 (W.D. Wash. 1999), illustrates the civil risk. The law firm in *Oxford* had periodically—but not continuously—represented an

out-of-state company on Washington matters over several years. The law firm had no active matters for the company when it then took on a case adverse to the company. The law firm, however, had not conclusively ended the relationship and the client asserted in a motion to disqualify that it had a continuing relationship with the firm. Absent clear documentation that the relationship had ended, the court disqualified the firm using the *Bohn* standard.

In re Egger, 152 Wn.2d 393, 98 P.3d 477 (2004), illustrates the regulatory risk. The law firm in *Egger* had represented a client on a bankruptcy claim against two debtors but was unable to recover the amount owed. The law firm later represented a second client in making a loan to the debtors to pay off the first client. The family of the second client, who was an elderly widow, sued the law firm asserting that it had mishandled her business affairs—including the loan. Her grandson also filed a bar grievance against the firm lawyer who did the loan work. The firm settled the civil suit and the lawyer was disciplined. In defending the disciplinary charge, the lawyer argued that the first client was no longer a current client at the time of the loan. The disciplinary hearing officer found, however, that there had been no definitive conclusion to the relationship and the first client was still shown as being a current client in the firm's conflict system at the time of the loan work. The hearing officer recommended discipline and the Supreme Court concurred. In doing so, the Supreme Court used the *Bohn* test.

The second major practical consequence of failing to delineate the end of a representation is that it leaves lingering both our ongoing duties to a client and the limitation period for claims arising from past work.

On the former, as noted above, our remaining fiduciary duties to former clients are generally limited to the specific matters we handled for the former client and resulting confidential information we obtained. By contrast, we have many broad duties to our current clients ranging from loyalty to competence. In short, failure to document the end of a representation may continue to leave you responsible for things that occur (or don't occur) in the client's legal life (at least in those areas your work involved) because they may still be deemed to have taken place "on your watch."

On the latter, the statute of limitations for legal malpractice is generally three years—tempered by both a discovery rule and a "continuous representation" rule. The continuous representation rule tolls the limitation period as long as the lawyer (or firm) continues to represent the client on the matter involved (*see Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn.App. 810, 819, 120 P.3d 605 (2005), for a detailed discussion of the contours of the rule). The primary issue on appeal in *Hipple* was the timeliness of the plaintiff's legal malpractice claim. The plaintiff argued that he continued to believe that two lawyers whose work he claimed was negligent represented him until June 2006 when new counsel appeared. The two lawyers, by contrast, contended that their work had concluded in 2005. Plaintiff did not file his legal malpractice claim until June 2009, but argued that it remained timely under the continuous representation rule. The two lawyers moved to dismiss under the statute of limitation, but didn't have any documentation to rebut the plaintiff's contention that he continued to subjectively believe that they were representing him until June 2006. The trial court denied the lawyers' motion to dismiss and the Court of Appeals affirmed. In doing so, the Court of Appeals adopted the *Bohn*-like test for fixing the conclusion of a representation. *Hipple* provides

apt illustration of how failing to clearly define the end of a representation can effectively extend the limitation period under the continuous representation rule.

Practical Solutions

The simplest practical solution is to send the client a “file closing” letter (or email) upon completion of a matter. The letter need not be either elaborate or off-putting. It can thank the client for the work while making clear that you are “closing your file” or something similar.

The letter or email needs to be sufficiently definite, however, to clearly convey that the work you agreed to do is done. In *Qwest Corp. v. Anovian, Inc.*, No. C08-1715RSM, 2010 WL 1440765 at *5-*6 (W.D. Wash. Apr. 8, 2010) (unpublished), for example, the court found that what appeared to be an interim status report on one phase of a project before beginning another was not sufficient to constitute a documented end to an attorney-client relationship—or to prevent the disqualification of the lawyers who tried unsuccessfully to rely on it.

If you have indeed completed your work and told the client that (preferably in writing), it will be very difficult for the client to credibly argue later that the relationship continued. The Court of Appeals, citing *Bohn*, put it this way in affirming the denial of a disqualification motion in *State v. Siriani*, 103 Wn.App. 1054, 2000 WL 1867632 at *7 (2000) (unpublished): “When an attorney makes clear disclaimers regarding representation and does not act inconsistently with those disclaimers, such disclaimers may establish that the . . . [former client’s] subjective belief is unreasonable.”