

December 2003 *Multnomah Lawyer Ethics Focus*

Defensive Lawyering Part 2: During the Representation

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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.

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

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