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Risk Management Basics, Part 2: Engagement Agreements

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This month, we'll continue our three-part series on law firm risk management basics by looking at engagement agreements. Although fee arrangements are not technically required to be in writing in most circumstances outside contingent fees falling under ORS 20.340 and fees denominated as "earned upon receipt" under RPC 1.5(c)(3), "getting it in writing" is always prudent. Beyond fees, engagement agreements are a cornerstone of risk management because they are also an ideal venue to document who the firm is representing and the scope of the representation.

Defining the Client

The "who is the client?" question underscores to whom we owe our duties and is central to conflicts analysis. In many instances, the answer is simple: the person sitting across our desk. In many other circumstances, however, the answer is much more nuanced. With individuals, we might have met with several family members. With businesses, we might have been contacted by an affiliate of a larger corporate group. In these scenarios, if we do not affirmatively define who is—and who is not—our client, a court may do it for us later in a disciplinary proceeding, a disqualification hearing or a legal malpractice trial.

In *Lord v. Parisi*, 172 Or App 271, 19 P3d 358 (2001), for example, a lawyer met with two cousins about a planned real estate development. The lawyer believed he was only representing one of the cousins. When the deal later went sour, the other cousin claimed that the lawyer had also represented him and had not protected his interest. Although the lawyer ultimately prevailed on appeal, that success followed several years of litigation. An engagement agreement specifically defining the client and an accompanying "non-engagement" letter to the non-client cousin might have prevented a lawsuit in the first place.

Under *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990) (and other decisions following in its wake), the test for whether an attorney-client relationship exists is twofold: (1) does the putative client subjectively believe that the lawyer is representing the asserted client? (2) is that subjective belief objectively reasonable under the circumstances? Although the subjective prong is a low bar, the objective prong is not and both elements of the test must be met. In the face of a written engagement agreement specifically defining the client, associated non-engagement letters and conduct consistent with both, it will be difficult for non-clients to successfully claim that the lawyer was also representing them.

Defining the Scope

In today's complex legal environment, both individual and business clients may have more than one law firm working for them on various projects and may be addressing other legal matters on their own. Defining the scope of a representation and then, absent an express amendment, acting consistent with that agreed scope, allows us to clarify the areas that we are—and are not—responsible for in a client's legal life. Engagement agreements describing the scope of the work are nothing new, with, for example, the Oregon Supreme Court discussing one for an automobile accident case in *Jones v. Kubalek*, 215 Or 320, 334 P2d 490 (1959). More recently, RPC 1.2(b), which became effective in 2005, specifically permits a lawyer to limit the scope of a representation.

Norton v. Graham and Dunn, P.C., 2016 WL 1562541 (Wn App Apr 18, 2016) (unpublished) offers a telling illustration. A real estate specialist at a law firm had a celebrated local client for whom the lawyer did template limited liability company agreements for the client's real estate developments in a foreign country. Unfortunately for all concerned, however, the client turned out to be running a Ponzi scheme and there were no actual developments. Litigation followed, including against the law firm for supposedly failing to detect and warn investors of the scheme. The law firm eventually prevailed, but its defense likely

would have been furthered if it had an engagement agreement with the client that specifically described the limited work involved.

Financial Terms

Defining the financial terms of an engagement is critical in both a regulatory and contractual sense. Although the level of detail will vary with the circumstances, clearly communicating how fees and expenses will be calculated, charged and collected can go a long way to avoiding misunderstandings for what can otherwise be a particular flashpoint between lawyer and client.

Given that legal matters seldom resolve quickly, it is often equally important to incorporate a mechanism for changing arrangements over time. For example, a firm may wish to adjust its rates annually or increase its contingent fee percentage if a case goes up on appeal. Although we are generally free to bargain at arm's length when negotiating an original fee agreement, regulatory, fiduciary and contractual duties limit our ability to unilaterally modify a fee agreement later. OSB Formal Opinion 2005-97 (rev 2016) puts it this way (at 3): "A modification of a fee agreement in the lawyer's favor requires client consent based on an explanation of the reason for the change and its effect on the client." Therefore, it is prudent to build a mechanism for change—such as the periodic adjustment of rates noted—into the original agreement. That way, when, in our

example, a year-end rate adjustment occurs, it is simply a bargained-for provision being implemented rather than a unilateral modification.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.