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Risk Management Basics, Part 3: Closing Files

By Mark J. Fucile
Fucile & Reising LLP

This month, we'll conclude our three-part series on law firm risk management basics with the deceptively simple, but sometimes naggingly difficult, topic of routinely closing files. It is deceptively simple because the task itself usually only involves letting the client know that you have closed your file along with actually closing the file internally. It can be naggingly difficult because closing files typically doesn't rank high on most lawyers' daily "to do" lists. But, it should. Closing a file can mean the difference between whether a person is classified as a current or former client. Generally, a current client can "veto" any proposed adverse representation. By contrast, a former client can only "veto" an adverse representation if the matter involved is either the same or substantially related to an earlier matter we handled for the former client or would necessarily involve the use of the former client's confidential information. Routinely closing files on completion or after a fixed interval, therefore, can go a long way to moving a client from the "current" to the "former" category and allow us to take on new work potentially adverse to the former client.

In this column, we'll first look at the regulatory underpinning of the distinction between current and former clients. Next, we'll look at practical ways to incorporate routine file closings into firm file management.

Current or Former?

Courts often describe our responsibility to current clients as one of "undivided loyalty"—meaning that we are not free absent a wavier (assuming a conflict is waivable) under RPC 1.7 to take on a matter adverse to a current client. Reflecting the sweep of that duty, current clients may generally grant or deny a waiver for a good reason, a bad reason or no reason at all. As noted, our duties to former clients are much more limited under RPC 1.9 and revolve around the specific matters we have handled for them and the associated confidential information we acquired. If we don't hit one of the two triggers for a former client conflict based on the nature of the matter or the confidential information involved, then we have a former client—but not a former client conflict—and do not have to ask anyone's permission to proceed. OSB Formal Opinion 2005-146 at 1 (rev 2016) captures this stark dichotomy between current and former clients: "For purposes of analyzing possible conflict situations, the distinction between current and former clients is crucial."

If a firm has not affirmatively taken the step of turning a client into a former one once a matter has concluded, the firm may find itself grappling with significant ambiguity over whether a client falls into the "current" or "former" category. OSB Formal Opinion 2005-146, for example, addresses situations

where a firm sends periodic reminders in areas like lease renewals for otherwise completed work. Determining whether an attorney-client relationship exists is governed by case law rather than the Rules of Professional Conduct. The leading case in Oregon on this point is *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). In *Weidner*, the Oregon Supreme Court articulated a two-part test: (1) does the putative client subjectively believe that the lawyer is representing the client? and (2) is that subjective belief objectively reasonable under the circumstances? Both elements of the test must be met.

Although the subjective prong of the *Weidner* test is a low bar, the objective prong is not. File-closing letters go to the objective element of the *Weidner* test. The simple passage of time may imply that an attorney-client relationship has come to an end. A file-closing letter, however, eliminates that ambiguity (assuming the law firm is not handling other active matters for the client and also assuming the lawyer acts consistent with the letter) and provides objective evidence of the relationship's end. While most often called "letters," the communication—and the associated record—can be in either paper or electronic form.

File Management

Closing files usually incorporates two distinct approaches.

The first applies to representations that come to a definite end. For example, a sale has closed or a case has been dismissed. In those situations, a polite, professional letter to the client thanking them for the opportunity to represent them and letting them know that you have "closed your file" will communicate that your representation has concluded. Although a final bill sometimes accompanies a file-closing letter, the two don't necessarily need to travel together.

The second applies to representations that do not have a distinct end. For example, advice was given on a possible claim that never occurred. In those situations, it is prudent to systematically review open files at an interval appropriate for particular practices and close those that appear to have concluded. A letter can then be sent—again letting the client know that you have "closed your file."

With both, internal records should also reflect that the matter has been closed. Ideally, individual matters should be closed in this fashion and once all matters for a client have been closed, any separate internal client status records should be updated to reflect the client's status as former rather than current. In that way, the firm won't be left puzzling over a client's status if it surfaces in a later conflict check.

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.