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Expecting the Unexpected: Reducing Ambiguity in Law Firm Risk Management

"'Ambiguity': A situation or statement that is unclear because it can be understood in more than one way."
~Cambridge University Dictionary[1]

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Ambiguity is generally not your friend when it comes to law firm risk management. Situations vary. It might be the comparatively rare circumstance of a non-client claiming to be represented by a law firm as a predicate to a legal malpractice suit.[2] More commonly, it might be a fee dispute with a client asserting that the law firm was not authorized to raise its rates.[3] Although each scenario is governed by legal standards, the practical burden of proving the opposite often falls on the law firm. In those instances, courts, regulators, and juries may instinctively look to the lawyer or law firm to produce documentation supporting their position because lawyers are professional "wordsmiths." If there is none, that ambiguity usually cuts against the lawyer or law firm.

All ambiguity cannot be eliminated. Some potential risks, however, can be reasonably anticipated and addressed prospectively in engagement agreements and related tools to meaningfully reduce ambiguity later. In this column, we'll look at three: defining the client and the associated scope of the representation; anticipating that fees may change over time; and addressing "limited fund" conflicts that can arise for plaintiffs' counsel representing multiple clients in

settlement negotiations. All three share the common thread that the ability to reduce later ambiguity is uniquely within the lawyer's control at the outset of the representation through an engagement or fee agreement. With each, we'll first briefly outline the problem and then turn to potential solutions that can be implemented in advance.

Before we do, two qualifiers are warranted.

First, these are by no means an exclusive list. Systematically closing files when projects are completed and telling clients that, for example, will ordinarily (assuming the firm is doing no other work for the clients concerned) shift clients from the "current" to the "former" category and will both reduce the ambiguity involved and create a clearer path to handling new work that may be adverse to a former client.[4] Similarly, other aspects of fee agreements beyond rate changes are subject to the familiar rule of contract construction that "ambiguity is construed against the drafter"—which in most cases is the lawyer or law firm.[5]

Second, as a representation moves forward, the "facts on the ground" may change. For example, the scope of the work involved may expand. In that event, the engagement agreement should be amended or supplemented so that it continues to accurately reflect the relationship and the terms between lawyer and client.

Defining the Client and the Scope

In many circumstances, the client a lawyer will be representing is obvious: the person sitting across the desk or the other end of a video conference. In others, however, black can fade to gray. In *Lord v. Parisi*, 19 P.3d 358 (Or. App. 2001), for example, a real estate lawyer was approached about a development project by two cousins. The lawyer ultimately only represented one but that was not communicated clearly at the outset. When the project failed, the cousin who was represented fared much better than the one who was not. The latter filed a malpractice claim against the lawyer asserting that the lawyer also represented him and did not adequately look out for his interest. Although the lawyer ultimately prevailed, it was only after years of litigation concluding at an appellate court. Similarly, in *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished), a lawyer took on a case for an affiliate of a larger corporate group without clarifying whether he was representing the affiliate alone or the larger group. Later, the lawyer's firm took on a matter adverse to another affiliate of the same group and was disqualified when the court found that the firm lawyer in the first matter had taken on the corporate group as a whole.

Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), is the touchstone in Washington for whether an attorney-client relationship exists. In *Bohn*, the Supreme Court articulated a two-prong test. One is subjective: does the putative client subjectively believe that the lawyer is representing them? The other is objective: is that subjective believe objectively reasonable under the circumstances? While the subjective prong is a low bar, the objective prong is more exacting—and where an engagement agreement comes in. If the lawyer has an engagement agreement defining the client and, depending on the circumstances, sent "non-engagement" letters or emails to others the lawyer met with initially but will not be representing, it is difficult for a non-client to claim later that the lawyer was also representing them. In the corporate context, if the lawyer's engagement agreement follows the definition of the client with the word "only," it will be difficult for another affiliate in the same corporate group to contend that the firm was also representing the broader corporate family.[6]

Similar considerations apply to defining the scope. In *Norton v. Graham and Dunn, P.C.*, 2016 WL 1562541 (Wn. App. Apr. 18, 2016) (unpublished), for example, a law firm that created template limited liability company agreements for a client's investment business was drawn into litigation surrounding the client's collapse when the seemingly successful business turned out to be a

Ponzi scheme. Although the firm was eventually exonerated, an engagement agreement specifically limiting the representation to the mundane template work would have likely gone a long way to rebutting investor allegations that the law firm should have been aware of the client's wrongdoing in areas beyond which the firm was responsible.

RPC 1.5(b) requires lawyers to outline the scope of a representation at the outset—"preferably in writing." RPC 1.2(c), in turn, allows a lawyer or law firm to limit the scope of an engagement if it is reasonable under the circumstances and the client gives informed consent. Although not necessarily a foolproof solution, defining the scope can protect a firm if there are issues involving other aspects of a client's legal life beyond those for which the firm was hired.

Changing Fees

RPC 1.5(b) also requires lawyers to inform clients of "the basis or rate of the fee and expenses for which the client will be responsible[.]" Contingent fees and fees involving business transactions with clients (such as taking stock in lieu of fees) are required to be in writing under, respectively, RPCs 1.5(c) and 1.8(a). In other circumstances, RPC 1.5(b) only suggests a preference for written fee agreements. Prudent practice, however, counsels memorializing most—if not all—fee agreements in writing.[7]

In addition to outlining items like rates and other billing practices, prudent practice also suggests including a mechanism for changing fees in the original fee agreement—such as a provision reserving the ability to increase hourly rates over time or increasing a contingent fee percentage if a case is appealed. The reason is simple: if not addressed in the original agreement, it can be difficult to change those terms later (assuming the nature of the work has not changed materially). Courts in both the hourly and contingent fee contexts have looked with disfavor on efforts by lawyers and law firms to simply impose increased compensation rates or percentages unilaterally for the same work that was anticipated at the outset.[8] Reviewing courts typically use a blend of regulatory (principally RPC 1.5(b)),[9] fiduciary and contract law standards in determining whether increased compensation can be enforced.[10] In many circumstances, however, courts denying enforcement of unilateral increases in compensation rely on a simple law school contracts class nostrum: "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."[11]

By including a mechanism for change in the original agreement, a subsequent change consistent with that agreement is not a "modification" falling within the authorities noted. Rather, it is simply implementing a provision that the

parties bargained over and agreed to at the outset of their relationship. In that sense, mechanisms for changing rates or percentages reduce subsequent ambiguity by planning for that from the beginning.

"Limited Fund" Conflicts

Plaintiffs' lawyers sometimes take on more than one client in the same case—with two passengers injured in the same automobile accident a recurring example. If the defendant's assets are sufficient to fully cover the plaintiffs' damages, no conflict typically results. By contrast, if the defendant's assets are insufficient, the plaintiffs' lawyer in my example is potentially faced with a nonwaivable conflict because the lawyer's clients are effectively competing for the same "limited fund." Comment 29 to RPC 1.7 puts a finer point on the lawyer's dilemma in this situation: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

If this unhappy situation is obvious from the beginning, the clients can simply retain separate counsel. "Limited fund" conflicts, however, may not be clear at the outset—due to the clients' injuries, the defendant's assets, or a combination.[12]

The Court of Appeals in *Matter of Lauderdale's Guardianship*, 15 Wn. App. 321, 325, 549 P.2d 42 (1976), suggested a practical solution to this

otherwise intractable problem. In *Lauderdale*, a lawyer represented two claimants to a limited settlement fund. The Court of Appeals recognized that there is no conflict when the lawyer simply assembles the largest possible fund for jointly represented clients—and the clients agree to the total sum involved.[13] The Court of Appeals in *Lauderdale* suggested that, once the original lawyer assembles the largest possible fund, the competing clients should then be represented by separate counsel in the division of that fund. The logic underpinning *Lauderdale* suggests that the clients could also decide on their own how the fund should be divided.[14]

Although arriving at the solution noted in *Lauderdale* may be possible when it arises during the litigation involved, this ambiguity can be reduced if a provision addressing this possibility is included in an original fee or engagement agreement. In that event, the clients are not being asked to waive a nonwaivable conflict. Rather, they are prospectively agreeing to a limitation on the scope of the lawyer's representation under RPC 1.2(c) to obtaining the largest possible fund for their division through other counsel or on their own if a limited fund conflict develops later.

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[1] https://dictionary.cambridge.org/us/dictionary/english/ambiguity.

[2] *See, e.g., Lagow v. Hagens Berman Sobol Shapiro LLP*, 2023 WL 7490078 (Wn. App. Nov. 13, 2023) (unpublished) (looking to "end of engagement" letter in holding that no continuing attorney-client relationship existed and affirming dismissal of former client's malpractice claim).

[3] *See, e.g., Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 988 P.2d 467 (1999), *amended*, 109 Wn. App. 436, 33 P.3d 742 (2000) (examining whether law firm rate increase was enforceable).

[4] *See generally Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (2011) (articulating test for when a client moves from "current" to "former"); *see, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999) (determining whether client was current or former when it had used firm periodically but not continuously).

[5] *See generally Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. 273, 288, 198 P.3d 1072 (2009), *aff'd in part and rev'd in part on other grounds*, 170 Wn.2d 157, 240 P.3d 790 (2010) ("Generally, an ambiguity in a contract is resolved against the drafter."); *see also*

In re Marshall, 160 Wn.2d 317, 335, 157 P.3d 859 (2007) ("It can be a violation of . . . RPC 1.5 to charge fees or costs outside of the fee agreement.").

[6] *See generally* RPC 1.7, cmt. 34 and RPC 1.13(a) (discussing organizational clients); ABA Formal Op. 95-390 (1995) (addressing conflicts in the corporate family context); *see also Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1004-05 (W.D. Wash. 2007) (discussing the terms "affiliate" and "subsidiary" in the corporate family context).

[7] *See also* ABA Formal Op. 487 (2019) (discussing responsibility of successor counsel in the contingent fee context to advise a client under ABA Model Rules 1.5(b)-(c) that prior counsel may be entitled to a portion of the fee under state attorney lien statutes in the event of a recovery).

[8] *See, e.g., Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, *supra*, 97 Wn. App. 901, (2000) (hourly); *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 754 P.2d 120 (1988) (contingent); *see generally* ABA Formal Op. 11-458 (2011) (surveying issues when fee agreements are changed); Restatement (Third) of the Law Governing Lawyers § 18 (2000) (same).

[9] "Attorney fee agreements that violate the RPCs are against public policy and unenforceable." *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007). When additional security for fees is involved, courts may also examine whether the lawyer or firm obtained a conflict waiver from the client under RPC 1.7(a)(2) and, depending on the circumstances, RPC 1.8(a). *See Valley/50th Ave., L.L.C. v. Stewart*, *supra*, 159 Wn.2d at 743-47 (trust deed added to secure fees already incurred); *see also* WSBA Advisory Op. 2209 (2012) (security for fees). RPC 1.8(a) has also been applied to other kinds of fee agreement modifications. *See, e.g., Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) (changing hourly to flat fee denominated as "paid in advance" and transferring property from the client to the lawyer for the "flat fee").

[10] *See, e.g., Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan, supra,* 97 Wn. App. 442-46; *Ward v. Richards & Rossano, Inc., P.S.*, *supra*, 51 Wn. App. at 428-433.

[11] *See, e.g., Ward v. Richards & Rossano, Inc., P.S.*, *supra*, 51 Wn. App. at 432.

[12] *See, e.g., In re Barber*, 904 P.2d 620 (Or. 1995) (at fault driver's assets proved to be insufficient to satisfy the damages of two injured plaintiffs).

[13] *See* RPC 1.2(a) (client is decision-maker on whether to accept settlement). *See also* RPC 1.8, cmt. 13 (reinforcing individual client decision-making on settlement when a lawyer is representing more than one client in the same matter).

[14] Regionally, Oregon follows a similar approach under OSB Formal Op. 2005-158 (rev. 2015).