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Defensive Lawyering Part 3: Concluding the Representation

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This month, we complete our look at "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. In November, we focused on the beginning of a representation. Last month, we examined defensive lawyering tools available during a representation. This last installment looks at concluding a representation.

At first blush, concluding 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 DR 5-105(C)-(D), former clients can only block an adverse representation by denying a conflict waiver when the new work is essentially the same or significantly 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 Oregon, whether a current attorney-client relationship exists is a two-part test: (1) does the client subjectively believe that you're his or her lawyer? and (2) is that subjective belief objectively reasonable under the circumstances. *See In re*

Weidner, 310 Or 757, 770, 801 P2d 828 (1990); OSB Legal Ethics Op. 1996-146. 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.

As with all elements of defensive lawyering, an end of engagement letter is designed with the twin objectives of clearly communicating with the client and documenting those communications in a way that the lawyer can rely on later.

ABOUT THE AUTHOR

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