

American Legal Ethics: Alert Defensive Lawyering
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There are times when being a lawyer means taking risks--both for our clients and for ourselves. There is a difference, however, between taking reasonable risks and playing Russian roulette. There is also a difference between taking on a degree of risk that a particular situation may require and taking on additional and unnecessary risk.

These differences are what defensive lawyering is about. Consider, for example, a client who asks you a question about a present or proposed course of action that may or may not be illegal. If, after reasonable research or consultation with others, you personally believe the conduct to be legal, you are free to say so. Nevertheless, principles of defensive lawyering should strongly incline you to tell the client that the question is open, that a contrary outcome is also possible and that a contrary outcome will harm the client. So far so good, but is it enough to deliver this message orally?

In this instance, principles of defensive lawyering should strongly incline you to create a written record. If you do not do so and if things later go badly, your client may later assert that you did not qualify your advice. You may then wind up on the short end of a jury verdict or having to settle a claim for fear of what a jury might do. But suppose you know from prior experience that your client objects to getting letters from you that, in your client's mind, serve only to pad your bill? Assuming for the moment that the client is worth keeping, one alternative to a formal letter that lawyers sometimes overlook is to send an email.

It may well be that you can get your principal points across in a few well-crafted paragraphs that can either be sent by themselves or be tacked onto an email on another subject. (Of course, if you are going to send such an email, you should make sure to print out a copy and place it in your paper file. Otherwise, you may not have it when you need it most.) Now let's change the facts and suppose that after reasonable research and consultation, you conclude that the client's present or proposed course of conduct is almost certainly illegal. It will not do, of course, to give the client a favorable opinion in order to curry the client's favor, and it is arguably a form of fraud not to level with the client.

Once again, however, this is not the end of the matter. I have met lawyers who are concerned that documenting negative advice can be a bad idea because of the risk of subsequent discovery due to loopholes in the attorney-client privilege or because the client may be insulted if the lawyer comes on too strong. The defensive lawyer should reject such concerns on the grounds that if the matter does later need to be litigated, the lawyer will be better off with providing advice in writing even though the client has no general right to purely oral advice.

And if the client truly won't accept either a letter or an email but is nevertheless one that the lawyer wishes to keep as a client, there is also the option of an internal memorandum to the lawyer's own file. Self-serving statements may not ultimately be as helpful as statements delivered to the client, but they may still be a lot better than nothing.

There is also a further reason to put qualified or negative advice in writing. All of us--lawyers and clients alike--sometimes hear only what we want to hear in conversations, or we may simply misunderstand or subsequently fail to remember parts of what someone has told us. Putting things in writing gives the client a second bite at the apple.

Even if you are certain that the client understood every word you said when you said it, why not give the client the face-saving and perhaps asset-saving chance to say that your written communication brought home points that your verbal remarks did not?

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If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

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