

RULES OF ENGAGEMENT: SCOPING THE CLIENT RETAINER

Does the client know what work you will (and won't) be doing and do you know what they expect?

LPLC regularly sees claims where practitioners have not scoped and documented the client retainer clearly and precisely, leaving room for the client to later argue that the practitioner failed to advise on or address an important issue or risk.

Typically, in this scenario client engagement letters are sent to the client which address cost disclosure requirements under the Legal Profession Uniform Law and other terms and conditions but otherwise fail to properly set out the scope of the retainer and the work the law practice will, and will not, carry out.

Scoping and documenting the client retainer may be seen by some practitioners as an administrative task. It should never be viewed in this light as the client retainer “almost exclusively charts the parameters of the lawyer’s duty of care in tort to the client – with limited exceptions”.¹

The scope of the retainer should be identified clearly in an engagement letter in every matter, no exceptions, describing what the law practice will and will not be doing for the client.

General statements such as “we are engaged to act on the purchase of the business” or on “the sale of the property” do not – without further information – provide sufficient clarity about the role the law practice will play in advising on the matter and the work that will or will not be done. Further, the client may expect the retainer will be wider than intended. A properly scoped retainer and engagement letter should detail:

- the client’s factual instructions and objectives in the matter
- the legal services the client has instructed the law practice to undertake
- the anticipated work that will be done – be as specific as practicable in the circumstances of the case
- equally important is recording what work the law practice will not be doing and is excluded from the retainer.

For example, the client may instruct you not to advise on certain matters or do particular work. Alternatively, the client may require advice that you are unable or unwilling to provide.

Be explicit if certain tasks or work are to be done by the client or another professional adviser. If you consider the client requires specialist advice such as accounting, financial, taxation or valuation advice it should be clearly explained.

Limiting the scope

Practitioners should exercise caution when determining the scope of work to be excluded from the retainer. Some work will be intrinsic in a retainer and cannot be excluded. In some matters the client may require guidance about certain issues and risks they will need to consider to be able to make informed choices. What is required will depend on the specific facts and circumstances of each case.

If the retainer is limited, alert the client to any relevant risks or consequences arising from the limitations and excluding work. Remember limited retainers will not be reasonable and appropriate in every matter.

Is there a meeting of minds? Check

It is critical practitioners and their clients have a shared understanding of the scope of the retainer. Practitioners should never assume – even for sophisticated or longstanding clients – that they will fully appreciate what work is involved in a particular matter and who will be responsible for each task.

Once you have scoped the retainer in writing, check with the client that they understand it and the work you will and will not be doing, along with any limitations and risks. A good way to do this is to schedule a call or meeting with the client. It may be risky to rely on email alone, particularly when you are dealing with a new client.

Ask the client to confirm in writing that they have read, understand and agree to the scope of your retainer and save this record to your file.

Stay alert for retainer creep

As a matter progresses, the scope or character of work may change. If it does, the scope of the retainer should be varied in writing or it may be appropriate to enter into a new retainer for the new or different work.

In some cases, work may change significantly and the practitioner may not have the experience or capacity to take it on. If this occurs the client should be referred to another practitioner or law practice.

Your best defence

A properly scoped and documented retainer sets expectations, provides clarity and a work plan of who will be doing what. In the event a claim is brought against a practitioner, it will assist the practitioner’s defence and provide evidence of the client’s instructions and the intentions of both parties. It may also help demonstrate the client was appropriately informed of any limits in scope and risks, and that the practitioner has met their professional obligations. ■

This column is provided by the **Legal Practitioners’ Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

1. GE Dal Pont, *Lawyers Professional Responsibility*, 7th edn; 3.20 at p82.

TIPS

- The retainer defines the parameters of a practitioner’s duty of care to the client in tort with limited exceptions.
- On every matter the engagement letter should clearly and precisely identify the scope of legal services that will be and will not be provided, leaving nothing in doubt.
- Always check the client understands the scope of the retainer including any limitations and risks.
- Monitor the scope of work as the matter progresses. The retainer may need to be varied or a new retainer entered into for new or different work.