LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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Engagement letters - what you will do and what you won't
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There is more to retainer management than simply complying with legislative cost disclosure requirements. A critical part of managing a retainer effectively is setting it up clearly at the start. Getting it right in the first place is the best risk management approach. Not only should you document what you will do but also what you won't do.

We have seen claims that practitioners could have easily avoided by properly scoping the retainer with the client and then documenting it in a letter.

In one claim the practitioner's friend of 30 years worked as a mobile lender for a bank. In his spare time he helped people obtain 'bridging finance' while waiting for bank approval. On one occasion the friend told the practitioner a mutual acquaintance wanted to lend some money and could the practitioner just look at the proposed loan agreement on behalf of the lender.

The agreement was for $120,000 for two months with interest of $6,000 per month, secured by a caveat to be lodged over a particular property. The law office clerk's title search showed the proposed borrower was not the owner of the property rather; the owner was the wife of the borrower. This was conveyed back to the practitioner's friend.

The loan agreement was redrawn in the name of the wife and sent back to the lender friend along with various other documents including the borrower's acknowledgment of independent legal advice and a solicitor's certificate to be filled in. The accompanying letter told the lender the firm had only been instructed to prepare a loan agreement and the firm had not done any checks on the suitability of the borrower. Two and half weeks later the loan was signed and the firm lodged the caveat.

Several months later the lender contacted the practitioner about the default on his loan and eventually brought proceedings against the borrower and the solicitor. The borrower argued the loan agreement did not create a caveatable interest. The lender said the practitioner had not advised him of the possible problem with the caveatable interest nor that that interest (if there was one) gave him no power of sale.

While the firm had tried to limit its retainer with the lender to just preparing the loan agreement, the lender's new solicitors argued:

- that there was no evidence that the instructions were as limited as that. There were no file notes of discussions with the friend, who was the agent of the lender
- the firm did more than was actually set out in the retainer letter by
- checking the title
- advising about the name of the borrower and property owner
- recommending the borrower be changed, and
- giving advice to the lender on how to complete the transaction.

Additionally, the lender said that there was an obligation on the practitioner to warn the lender of the risks associated with the transaction.

This example shows the importance of properly scoping and documenting your retainer. While the firm tried to do so here, they did not clearly set out what they were and were not doing.

In some ways, in a limited retainer, it is more important to say what you won't do than what you will do.

Sometimes it is not enough to limit your retainer without giving some guidance to the client about other issues and matters they may want to consider. Clients often don't know what they don't know in order to make an informed choice.

Before accepting a retainer there are a number of things you should consider:

- who is the client
- is there a conflict or likely to be one as the matter progresses
- what will the scope of the retainer be
- do you have the skills, time and resources to take on the matter
- who can and should you delegate the matter to.

If you decide to act, your retainer and cost disclosure letter should clearly set out what you have agreed to do and just as importantly what you will not do, particularly if the client has agreed to do some of the work themselves.