

INSURANCE ISSUES: *Risk Management*

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Lawyers
Insurance
Fund

Managing the risk of a limited retainer

THE LIMITED RETAINER: For clients anxious to minimize the cost of legal services, it's a concept whose time has come. Colloquially known as "unbundling," the limited retainer involves splitting the usual package of work involved in a matter into discrete tasks. The client retains the lawyer to perform only some of these tasks, and maintains responsibility for the remainder.

Unbundling arises in a variety of contexts: litigants interested in self-representation but requiring some technical assistance; business clients keen to attend to numerous aspects of a transaction themselves; executors seeking only to have documents notarized; and numerous others. Using examples from our claim files, this *Insurance Issues* identifies the unique risks created by the limited nature of the lawyer's retainer, and then offers some tips to help avoid them. It also provides suggestions for managing the risks created when acting only to take an affidavit or notarize a document.

The risks

Failing to warn

In these cases, the lawyer understood that the retainer was limited, but failed to clearly advise the client of the limits and alert the client to the consequences and associated risks of the limits. For example:

- Driver #1 was sued by driver #2 for injuries

suffered in a collision, and retained the lawyer to act as his defence counsel. Driver #2's claim was dismissed when the Court unexpectedly found him at fault. Driver #1 then advised that he was injured, as well, and wanted to sue driver #2 for damages. When he discovered that the claim was res judicata, he sued the lawyer instead.

- Lawyer retained by the purchasers of a lot. The lawyer accepted instructions not to

obtain a copy of a right of way, but didn't explain the potential consequences of those instructions. The lot was worth far less than the price paid, and the purchasers claimed the lawyer was at fault.

- Wife retained lawyer simply to incorporate into a separation agreement a matrimonial settlement reached separately by the parties through mediation. The wife later discovered significant assets were not disclosed by the husband, and blamed



the lawyer for failing to investigate.

These failures leave the lawyer exposed to the argument that the client would have either elected to expand the retainer if the client had appreciated the limits, consequences or risks involved, or taken other protective steps.

Accepting limits that are unreasonable

Some matters are simply not appropriate for a limited retainer. The legal issues may be too complex, technical or critical to the outcome the client seeks. For example:

- *Potential commercial tenant asked the lawyer just to “take a look” at an offer to lease that the tenant was contemplating. The lawyer was unaware that the registration of such a lease would trigger significant taxes. The tenant registered the lease and then blamed the lawyer when taxes were assessed.*

If the client still insists on limiting the retainer, the lawyer should refuse to act.

No shared understanding

In these matters, a decision is reached to divide responsibility for tasks between the lawyer and the client, but there is no shared understanding or agreement about who is responsible for each specific task. For example:

- *Lawyer acted for an employee who had been dismissed. The employee had stock options. The lawyer understood that the employee would be responsible for ensuring that the options were exercised in time, but the employee failed to do*

so, lost profit on the shares, and claimed against the lawyer.

- *A matrimonial client asked her legal aid lawyer to act for her in another matter. The lawyer agreed only to file an Appearance. Judgment was taken in default of a defence, and the client blamed the lawyer.*

Sometimes, this lack of shared understanding is even more basic, and goes to the heart of whether or not the retainer is, in fact, full or limited.

Not qualifying the advice

A limited retainer may result in the lawyer providing advice or services based only on information the client chooses to provide. Sometimes lawyers fail to qualify that advice by explaining that it is based on facts, circumstances and assumptions evident only from the client's information and might change with additional information. Without this qualification, the client is unable to make an informed decision on whether or not to expand the retainer. For example:

- *A property owner asked a lawyer if there were any negative aspects to a sewage easement that he wanted to grant a neighbour, but limited the lawyer's review to the information the owner provided. The owner later discovered that the neighbour was subdividing his property and that two sewer lines would run through the easement. The owner alleged that the lawyer should have warned him that the neighbour might subdivide.*

- *Lawyer received limited instructions from a husband to attempt to resolve certain matrimonial issues. When the retainer was later expanded to pursue the division of matrimonial property, she learned that the family home had been transferred by the wife, in whose name it was registered.*
- *Lawyer accepted a limited retainer to issue a Writ to protect a claim under a fire insurance policy. The insurer later seeks dismissal of the action on the basis that it was started prematurely, before the proof of loss was sworn. The limitation for starting a new action has since expired.*

Managing the risks

Generally

In the majority of reports the Lawyers Insurance Fund receives relating to limited retainers, the problem could have been avoided through better communication by the lawyer. Explain what you will and will not do. As necessary, alert the client to any risks or consequences arising from the limitations, and advise on any qualifications to your advice. Obtain your client's acceptance of the limited retainer on the terms discussed, and written acknowledgment from your client that he or she understands and accepts these terms.

Confirm the extent of the services you will (and will not) provide, as well as your advice and warnings, in a written retainer agreement using clear, plain language. A retainer agreement will help ensure that both you and your client are clear on the terms to which you have agreed and, in the event a claim is brought against you, will greatly assist in your defence. One lawyer, targeted by purchaser clients of a strata unit in a building under renovation on discovering that the strata corporation was unable to pay for the renovations, echoes this advice when he recommends “*Be clear in writing about who is going to do what.*” In that matter, the purchasers had conducted their own investigation of the strata debt, but no one had taken responsibility for ensuring that the scope of that investigation was adequate.

Sample retainer agreements are available in the Practice Support section of the Law Society's website (lawsociety.bc.ca). Customize them as needed to deal with a specific limited retainer, and consider including: the reasons for the limited

Ethical considerations

If you provide limited scope services, please review the recommendations of the Law Society's Unbundling of Legal Services Task Force, designed to ensure that these services are provided ethically and competently. The recommendations include advice regarding professional conduct, confidential drafting assistance, communications and conflicts. They are set out in the Task Force's report and incorporated, as appropriate, into the Annotated *Professional Conduct Handbook*.

Both the report and the annotated *Handbook* are available in the Publications & Forms section of the Law Society's website.



retainer; a requirement that any changes to the terms — particularly to the extent of the services provided — must be agreed to in writing; and any other obligations, such as communication and cooperation, that arise when tasks are interdependent.

In addition:

- Use the initial meeting with the client to carefully assess the appropriateness of the limited retainer. Consider the client's expectations and abilities. A long-standing, sophisticated business client presents very different considerations for unbundling than a first-time family law client.

Even with an experienced client, however, avoid making assumptions — check things out. And consider the nature of the matter. A limited role may not be appropriate if it precludes a full legal analysis of a matter. One lawyer

provided limited advice on an ongoing basis to a client defending a claim brought against him by a neighbour for improperly removing trees. In fact, the municipality had advised the client that the trees were on her property. The client later blamed the lawyer for failing to advise her to third-party the municipality.

If tempted to act in these circumstances, consider that lawyer's comment: *"I will do one-off matters on a limited retainer basis, but only where there are clear 'start and end' parameters."* Providing services on discrete matters, rather than on matters in which the tasks of the lawyer and client are connected, tends to be less risky.

- Make sure that others in your office involved in the matter are aware of the limited retainer.

- Be proactive in dealing with the client if cracks in the arrangement start to appear — a client's sloppy work may put you at risk.
- Checklists, such as the Law Society's Practice Checklists, are very helpful in identifying who (lawyer or client) is responsible for what and ensuring that nothing slips between the cracks. Some lawyers use the Checklists when meeting initially with a client interested in sharing tasks. Each item is reviewed and initials (lawyer or client) beside the task records the agreement of who is responsible for what. The Practice Checklists Manual is available in the Practice Support section of the Society's website.
- If your role is to provide anonymous drafting assistance to a client:
 - Alert them to the rules in this regard. This will avoid a client looking to you

when facing the cost consequences of an unsuccessful matter; and

- Chapter 10, Rule 10 of the *Professional Conduct Handbook* obligates disclosure of a limited retainer in any case where failure to do so would mislead the court or any other interested person in the proceeding, so warn your client in advance that your role may become public. Advance notice will help manage the client's expectations in this regard and avoid the potential unhappiness that might trigger a complaint or, albeit defensible, a claim.
- Remember that a limited retainer is no different from a traditional retainer in terms of general risk management practices you should employ. For example, you should not accept a limited retainer for a matter that you do not feel competent to handle, as you must still meet

the standard of care in providing services. Anticipate and set out the terms on which the retainer will end or you can withdraw and, when your involvement is concluded, confirm it in writing. Ensure that your client's expectations of the legal process and fees are effectively managed. Again, the Law Society's sample retainer agreements can help you identify issues that you will want to address with any client.

If acting only as a commissioner for taking affidavits or for the purpose of notarizing documents

Use of the stamp "no legal advice sought or given" when a lawyer has acted as a commissioner or notary only, provides evidence of the limits on the lawyer's retainer. To keep that evidence unassailable you should:

- Ensure your actions are consistent with

the stamp's message. Taking additional steps that belie the message, such as actually offering some advice despite the warning, may create additional duties.

- Consider having the client initial the stamped message to acknowledge that it was read and understood. This will help protect you from a client who later tries to advance a position that is inconsistent with the stamp's wording.
- Consider using a second stamp that clearly states the very limited nature of the services the lawyer provided (for example, "officer certification only").
- Recognize that the stamp's use is appropriate in some circumstances, but not all.
- If a stamp is unavailable, write the words yourself or make some contemporaneous note reflecting the limits of your retainer.



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