Limited scope representation: The importance of drafting detailed retainer agreements

By Shari Scolnick

Since the cost of “full service” representation is cost-prohibitive for many, it is not uncommon for clients to retain an attorney to perform designated legal services. In the corporate world, it is also not uncommon for corporate clients to divide legal representation into discrete tasks and to retain different lawyers to perform specialized and specific legal services.

A Limited Scope Retainer “LSR” is a retainer agreement wherein the client agrees that the attorney will provide legal services for part, but not all, of the client’s legal matter. Common examples include a pro se litigant retaining an attorney to “ghost write” pleadings, a consultation to evaluate the legal merit of a potential claim; or an engagement to provide tax advice on a corporate transaction.

LSRs clearly provide benefits to both attorneys and clients. For clients, LSRs reduce the cost of legal services and provide options. Clients are not forced to choose between “full service” representation or no representation. For attorneys, LSRs provide an opportunity to expand their client base and to tailor their practice’s focus.

That being said, LSRs carry certain risks, especially to attorneys who do not clearly communicate the limited nature of the legal work they are agreeing to perform. If a scope of one’s retention is not effectively communicated to a client, a lawyer may, unwittingly, be held liable for failing to perform duties that were outside of the limited retention originally anticipated.

In order to avoid risks stemming from unclear communication regarding the scope of the retention, it is vital that every attorney prepare a written retainer agreement clearly articulating the scope of the representation. An attorney should carefully review the ethical requirements and rules for entering into an LSR in his or her specific jurisdiction before entering into such an engagement, to ensure compliance. While requirements vary by jurisdiction, at a minimum, the retainer should be in writing, describe the limited work the attorney was retained to perform and reflect the client’s informed consent to the arrangement. Depending on the circumstances, the attorney should consider including a statement of what legal services will not be provided or included in the representation. The retainer should also include a statement of who is in charge of filing documents (if applicable), of how disbursements are to be treated; and how fees are to be calculated and paid. As with any type of retainer, it is important that the agreement describe the circumstances in which the engagement is completed or in which the attorney is entitled to withdraw. If the client seeks further assistance from the attorney after the original matter is completed, the attorney must be sure to draft a new full or limited scope retainer.

Just recently, in Attallah v. Milbank, Tweed, Hadley & McCloy, LLP, 2019 NY Slip Op00583 (App. Div.), the Supreme Court of the State of New York, Appellate Division, Second Department, issued a decision finding that a firm’s detailed and limited retainer agreement with a client precluded the client’s later malpractice suit. In Attallah, the defendant law firm agreed to assist a client on a pro bono and limited basis to “investigate and consider options that may be available to urge administrative reconsideration of” the client’s expulsion from the New York College of Osteopathic Medicine. After the college refused to reconsider the client’s dismissal, the client commenced a legal malpractice against the defendant firm for failing to negotiate administrative reconsideration on the plaintiff’s behalf and failing to commence litigation against the college, among other things. In general and in New York, an attorney may not be held liable for failing to act outside the scope of a retainer agreement. See Ambase Corp. v. Davis Polk & Wardell, 8 N.Y.3d 428 (2006). In rejecting the client’s claim, the Appellate Division, Second Department, in Attallah, heavily relied upon the detailed and written letter of engagement, which clearly delineated the limited scope of legal services that the firm agreed to provide.

Similarly, in Jones v. Bresset, 47 Pa. D. & C.4th 60(C.P. 2000), the court found that a Pennsylvania attorney who was retained for limited purpose of obtaining an accounting from his client’s former attorney was not liable to the client for failing to file suit against the former attorney for malpractice. In dismissing the plaintiff’s malpractice claims, the Court again relied on the attorney’s clearly defined retainer agreement and written notice to the client that the representation would not include filing a malpractice suit.

In contrast, a Nevada plaintiff sued her attorney for failing to file a personal injury action against her husband after she
attended a consultation regarding same. The lawyer agreed to evaluate the case, but claimed that she told the client that she would not bring the action. Since the attorney did not have any written documentation or any concrete evidence of the limited scope of her retention, the Court found that there were issues of fact precluding summary judgment dismissal of the client's malpractice claim. See Allyn v. McDonald, 910 P.2d 263, 265 (1996).

In sum, clear client communication and written documentation evidencing the same, is the best way to reduce possible risk when working on a limited retainer matter. As the above cases illustrate, a comprehensive and written retainer agreement can prevent attorneys from being imposed with unintended duties. At a minimum, it is vital that attorneys properly communicate the limited nature of the legal work they are agreeing to provide, any costs or fees, and the circumstances under which the attorney’s representation will be deemed to be complete.

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