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Toolbox

How to... Prevent client engagement issues

Are you clear about exactly what you agreed to do for your client? And is your client clear too? Clarity in the engagement goes a long way to avoiding problems in the future. Defence lawyer **Ross Donaldson** explains how to avoid potential issues.

ROSS DONALDSON

As I put the finishing touches to another settlement of a litigated claim against a professional advisor, it occurred to me how common the claims were – and how difficult they were to defend – when, at the heart of the dispute, was the question of the scope of the professional's services. Many times I have rolled up my sleeves ready to tackle the big issues in the defence of a new claim, seeking to determine if the work performed or advice given was careless, only to be confronted by a simpler issue: the professional says they were not engaged to do the work at the heart of the complaint, but the client says otherwise. For accountants, tax advisors, or financial advisors, the complaint is frustratingly common.

The scope of services are set out in an engagement letter that the client signs, or at least acknowledges. The letter generally sets out the contractual terms and conditions by which the professional agrees to act. A formal letter of engagement is not necessary to establish a contractual relationship between a professional and client – an invoice, a note or the facts alone may establish a contractual relationship. The professional may owe a duty to exercise reasonable care to the client in any event, absent any clear contractual relationship.

Nevertheless, when things go wrong and losses are suffered, recourse to the professional advisor is common. What is important is that when this occurs, the professional advisor must be clear about what they agreed to do. Unambiguous written engagement letters will assist.

Such clarity may not eliminate the claim, but will take out one element of ambiguity in the litigation, and some headaches for your defence team. The more ambiguity there is in what a professional did, or agreed to do, (imprecise engagement terms, poor documentations and file maintenance) the greater the pressure points the claimant has against that professional in litigation – how can you explain to a court what you did, or agreed to do, if you cannot show this by clear documentation, and when the client says otherwise?

When sued, the professional dusts off the file (sometimes archived years ago), digs down to extract the engagement document and, assuming one exists (not always a given), the letter often describes in the most general sense what services are to be provided. Then we get into nasty disputes about who agreed to do what. It is common for claims against professionals to be commenced many years after the services complained of were provided. Hence, the need to be clear from the beginning as to what services were agreed on and what were excluded, before memories fade and documents are lost.

A professional will always say they were clear about what work was to be performed, and they are now astounded the client would say otherwise. Yet, where there is imprecise language in an engagement letter, the courts are inclined to give the client the benefit of the doubt, often taking the view that it was the professional's obligation to be clear about the scope of services.

To avoid litigation and to adopt good risk management procedures, before you shoot-off your standard form engagement letter for your next assignment, warmed by the inner glow of securing a new matter or client, pause for a moment, and take some time to think about what services you are to provide, and why.

Here are some simple points on the need to be clear about the scope of your engagement with some suggestions to avoid that nasty dispute:

- It sounds obvious, but put the terms of any engagement in writing from the beginning. You would be surprised how many professionals overlook this basic step.
- Understand clearly what your client wants in the way of services: is it a specific task or matter, or a more general, all encompassing engagement. The latter case requires more attention to describing what your engagement will or will not do.
- Too often engagement letters are long in detail, with standard terms and conditions regarding billing and costs, but short on an accurate description of what services are to be provided. A description of the services to be provided is usually a short one-liner, inserted by the word processor among the detail of the pro forma terms and conditions.
- Use simple, but precise, language in setting out your engagement. It does not have to be detailed if the task is clear. But be as specific as possible. Language incorporating general expressions is open to different interpretations.
- If the engagement modifies or changes, modify scope of services in your terms of your engagement to accommodate these changes.
- It is impossible to foresee the future, but think about where the engagement might go, based on your experience of similar matters or clients. Will it bring other work, different assignments, and different projects? If so, remind yourself to review the engagement letter to ensure you update the engagement to carefully describe these new assignments, and what you have agreed to do. You might initially start to do a client's annual tax return, but did you agree and understand you were advising generally on the client's overall tax affairs, including some specific and somewhat complex tax issues – the client might say you did, or thought you were. Continuing to update your engagement letter as the work changes is important.
- Alternatively, revising your engagement letter may be a cumbersome process in some circumstances. So make a mental note to simply write a short letter to the client when the occasion arises, and when you find you are doing work not contemplated by the original retainer, to confirm you are not advising them on certain issues, and they must either retain you specifically to do so, or if it is not within your expertise, they must retain another. Lawyers commonly get sued by a client when acting in commercial transactions, with the client thinking they assumed a duty to advise on the financial or commercial aspects of the matter generally. When the complaint is made the lawyer is usually stunned to think they would, or could, provide such services, but a poorly expressed scope of services leaves the whole matter open for dispute.
- When a project involves the coordination of multiple advisors or consultants, think about what your specific role might be, and who should be doing what. Does the client fully understand your role and its limitations? Describe it clearly in writing. My experience is that, commonly in co-ordinated projects, advisors often take a narrow view of their duties (sometimes driven by the client's, or their own, cost/fee considerations), and some matters are overlooked. Such assumptions can be terribly wrong. Co-ordinated projects often end with some nasty losses when an important, but sometimes seemingly insignificant, matter is overlooked by all on the project. The law may impose a duty on you to do things that you thought should be done by others. Better communication may have avoided the problem.
- If part of the assignment is not within your expertise, or you do not have the time or resources to do it, say so. Best be upfront with your client early, rather than an ugly misunderstanding later.
- Avoid conflicts. Is there a chance you may be acting for more than one person or entity with different interests? Will their interests conflict? Should they be encouraged to get independent and separate advice? Say so in writing, or state who you will not act for. The trouble with conflicts is that they are usually not seen at the beginning of a client relationship, but have a habit of rearing their ugly heads in the middle of the assignment, when it is all is too late to reverse course. It sometimes takes considerable foresight to identify potential conflicts that may arise in an assignment, so be cautious from the start.

The suing of professional advisors when losses are sustained is part of the modern business landscape. Litigation is generally an unpleasant and unhappy experience. Money is spent, management time is wasted, relationships are soured. My suggestions will not bulletproof you from all claims, but may eliminate one point of contention and strengthen your defence on other grounds.

> The law may impose a duty on you to do things that you thought should be done by others. A little better communication may have avoided the problem.

FAST FACT

Professional Standard APES 305 requires the terms of engagement to be documented.

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WANT TO KNOW MORE?

Professional standard APES 305 requires members of the Institute to document the terms of engagement with clients. Members can access free guidance on this matter at bit.ly/engagementletter

There are also two Institute publications available for sale, to help members improve marketing and client retention: *Client Science* and *Clients4Life* are available at charteredaccountants.com.au/clientscience and charteredaccountants.com.au/clients4life