Limiting The Scope Of Representation Is Critical For Lawyers

By **Ronald Levine** (October 5, 2022)

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The critical importance of a well-written engagement letter was highlighted by a recent legal malpractice decision.

In Kee v. Howard L. Nations PC in August, the U.S. District Court for the Northern District of Mississippi denied summary judgment where a law firm claimed that it did not act negligently in failing to pursue a medical malpractice claim for injuries allegedly arising from a medical device.[1]

The firm claimed it had never agreed to pursue the claim; it was only engaged for a potential product liability action. The engagement letter provided that the law firm would "prosecute all claims against all necessary defendants arising out of Event: Injury(ies) after implantation of [inferior vena cava] filter."

The court found that the description of scope of services was ambiguous as to whether it was limited to a product liability claim against the filter manufacturer.

After an in-depth review of the engagement letter's terms, the court did not accept the law firm's argument that the letter was unambiguous. The court found that there was an open fact question as to whether the firm had agreed to pursue a potential medical malpractice claim arising from related follow-up treatment.

Many legal malpractice claims do not reach the stage of an actual published court opinion. The ones that do appear often send significant messages to the bar.

Here, this opinion is a stark reminder that out of the thousands of documents a lawyer will prepare, there is one document that stands out as the most important: the client engagement letter. And the critical part of that letter is usually in the first paragraph: the scope of representation.

Clearly state what you will, and will not, do.

When it comes to the courtship of clients, too many lawyers "go big." Hoping to get as much future work as possible, some lawyers do not even describe specific services, and simply state that "We are honored to be representing You as Your Counsel."

If the relationship goes south, that broad undertaking could become a curse.

Clients may not recognize that lawyers are not utility players. It is near impossible for a lawyer to be a top tax, securities, environmental and litigation attorney all at once. Encouraging a client's unrealistic expectations of unlimited capabilities can lead to exposure if anything goes wrong, whether or not it falls within the lawyer's competency.

To avoid confusion, and limit legal malpractice exposure, lawyers must define the scope of work in the engagement letter. The extent of a lawyer's duties to its client can and will be measured by those words.

In addition to describing what the lawyer will do, the letter should be clear on what the

lawyer will not be doing.

For example, consider the scenario in which the client discovers that a huge tax exposure resulted from a transaction for which a lawyer merely provided trademark advice. If the unhappy client threatens a malpractice suit against the trademark lawyer, an initial engagement letter that stated that "we will not be providing tax advice" would provide great protection to the lawyer.

During a baseball game, a pitcher could be used to pitch only one inning. Similarly, a litigator could be retained for a limited purpose — for example, negotiating the settlement of a potential claim.

The engagement letter should spell out the lawyer's contemplated limited services, and provide that a separate written agreement will be required if a lawsuit is filed. And, if the case is not settled and the engagement continues, the letter should confirm what the lawyer will be handling, and whether the representation will include any appeals.

As the Mississippi case highlights, the duties should be spelled out clearly and specifically. Accordingly, even when limiting the engagement to a specific field of law, avoid vague and broad promises.

An undertaking to prosecute all claims could be interpreted to include any cause of action against anyone in the world. For example, the Mississippi court noted there were "no specific caveats listed in the Contract." If medical malpractice claims had been one of the caveats, the suit against the law firm may have been dismissed.

When defining the limited services that the lawyer will provide, avoid unnecessarily raising the bar. While there is a great temptation to promote oneself in the engagement letter, do not promise excellent or highest-quality legal services.

By the time the engagement letter is being sent out, the lawyer has probably landed the business. There is no need to engage in puffery. Such promises can provide the client with added fodder in a malpractice suit.

Ethically you can spell out the limits of your services.

The ethics rules generally permit a lawyer to limit the scope of representation if it is reasonable under the circumstances and the client gives informed consent. To satisfy these obligations, the lawyer must communicate adequate information to the client in order to explain any material risks arising from the proposed limited scope.

The amount of information will depend upon the client's level of sophistication, and whether the client has separate counsel. An engagement letter signed by the client that explicitly states which services will not be provided will go a long way to fulfilling this responsibility. Additionally, a conversation with the client explaining what legal services are — and are not — being provided is also important in order to obtain informed consent.

While the rules permit a lawyer to limit the scope of representation, the courts have not permitted lawyers to stick their heads in the sand when it comes to apparent issues that fall outside their limited representation. A lawyer may well have to alert a client to some related issues that the client may be overlooking and should be pursued to avoid prejudice.

Notably, a lawyer does not have to represent a client on reasonably related matters if such

matters fall outside the scope of representation. Rather, the lawyer's duty can be satisfied by informing the client that the limitations on the representation create a potential need to obtain additional legal advice on the peripheral or collateral issue.

If the responsibilities change, put it in writing again.

Of course, lawyers are always seeking to continue, and expand, their relationships with clients. If the lawyer is fortunate to have the relationship grow, any new services outside the scope of the initial undertaking should be spelled out in writing.

The initial engagement agreement should contemplate additional services, and provide that any new services would require an additional writing. The billing attorney should also pay attention to the services that colleagues are providing. If the firm was engaged to provide trademark services, and it is helping with tax returns, it would be wise to take action and amend the engagement letter.

In the Mississippi opinion, the court stated that it "first looks to the language of the Attorney-Client Contract."

When faced with a malpractice claim, the written engagement agreement may well become the first line of defense. The agreement should not be treated as a boilerplate document that the lawyer's assistant spits out when a new matter or client is opened.

The lawyer would be doing the client and the lawyer a big favor to give it some thought, by carefully filling in the blank in the firm's form letter: "We look forward to providing you with _____ services."

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[1] Kee v. Howard L. Nations, P.C., 2022 WL 3438467 (N.D. Miss. Aug. 16, 2022).