Legal Times
WEEK OF SEPTEMBER 10, 2007 • VOL. XXX, NO. 37
ALM

What Have You Promised to Do for Them?

There is virtue—and now a clear ethical mandate—in spelling out the scope of your legal representation.

By Arthur D. Burger

Ethics

What's more basic for any sensible contractor than putting in writing a clear description of the job he has bid for? Landscapers, roofers, and carpenters all do it. If you priced a job based on planting eight shrubs and working on the backyard only, why take a chance the homeowner will claim you promised 16 shrubs and work on the side yard, too?

For lawyers, there is both an ethical mandate to define the "scope of the representation" at the outset of a case and a far greater risk than a few additional shrubs if the client has a different (and broader) understanding of what the lawyer was supposed to handle.

This ethical obligation was added as one of the series of amendments to the D.C. Rules of Professional Conduct that became effective on Feb. 1. Now, D.C.'s Rule 1.5(b), like the American Bar Association Model Rule, requires lawyers to clearly define "the scope of the lawyer's representation" at or around the time of taking on a case. Unlike the ABA rule, the D.C. rule mandates that the scope be in writing (together with a full explanation of the fees and costs to be charged).

It's easy to see why this should be part of a lawyer's ethical mandate. A client has a right to be told exactly what it is that the lawyer has agreed to undertake, ideally including an understanding of what the lawyer has not agreed to undertake. The client has the concomitant right to reject the lawyer's proposed scope and to negotiate for a mutually acceptable one.

Moreover, D.C. Ethics Opinion 330 notes that it is permissible and appropriate for lawyers to limit their representation of clients to something narrower than what has been conventionally understood as a "full service" representation. Such "unbundling" of legal services has been recognized as providing a way for clients to reduce the cost of legal services.

Not Just Another Chore

Lawyers should recognize that spelling out what is included and what is not in a retainer agreement is not just another chore. Instead, it's a chance to place boundaries on what clients can later hold the lawyer accountable for through a malpractice suit or a disciplinary complaint. The process of discussing the scope also benefits clients by allowing them to make an informed choice as to how much legal service they want to buy.

One recent case provides an illustration. In *AmBase Corp. v. Davis Polk & Wardell*, 8 N.Y.3d 428 (2007), New York's highest court dismissed a legal malpractice suit because the alleged malpractice was outside the scope of representation described in the retainer agreement.

In the underlying case, the Internal Revenue Service had issued a notice of tax deficiency of nearly $21 million to AmBase, a company that manages commercial real estate. AmBase then hired the law firm of Davis Polk & Wardell to defend it in U.S. Tax Court on this alleged deficiency. Davis Polk won the case in tax court, and the IRS' tax claim was defeated.

Notwithstanding that victory, AmBase brought a legal malpractice suit against the law firm, alleging that the company could have avoided the tax litigation entirely and compelled its former parent company to defend the tax suit if the firm had advised it that, at worst, it was only secondarily liable for the taxes. AmBase demanded reimbursement of its attorney fees and claimed damages for having unnecessarily maintained a financial reserve on the potential tax liability while the case was being litigated.

The retainer agreement identified the scope of representation as "resolving the tax issues currently before [the IRS]," and the court held that the alleged malpractice was outside this scope. The court stated:

"The plain language of the retainer agreement indicates that Davis Polk was retained to litigate the amount of tax liability and not to determine whether the tax liability could be allocated to another entity. Thus, the issue whether plaintiff was primarily or secondarily liable for the subject tax liability was outside the scope of its representation."

Let's Be Clear

While Davis Polk succeeded in defeating its client's malpractice suit, other firms may avoid even the filing of

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a malpractice suit if they use language that is even clearer. Specifically, in addition to defining the task to be undertaken in a careful way, a firm can also state what it has not agreed to undertake. For example (and in hindsight), the retainer agreement in the AmBase case might have stated that the firm was not expected to provide tax advice outside the confines of the IRS litigation. Hypothetically, that might have generated a constructive discussion as to whether additional tax advice was wanted or needed.

You may think that including those kinds of disavowals is not practical, but if they are done right, following a candid and businesslike discussion of options with the client, they need not convey anything combative or hostile. For example, such a clause can be prefaced with a phrase such as "absent further discussion and agreement between the parties." This shows that the firm might well be happy to include other related areas of responsibility if the client chooses (and is willing to pay for it).

Nor am I suggesting any sleight of hand or unfair treatment of clients. To the contrary, I am talking about diligently exploring the range of alternatives and then eliminating potential ambiguities about the genuine intentions of client and lawyer. The idea is to bring clarity to the matter, rather than avoiding such clarity out of misplaced reticence. There is nothing more conducive to a healthy lawyer-client relationship than unhurried and frank discussions about the expectations of each of the parties.

Silence Means . . .

Consider another illustration. Let's say a person has been arrested and charged with disorderly conduct in connection with a political demonstration. He consults with a young lawyer who is developing trial experience by handling criminal cases. They discuss the case, and they clearly agree that the lawyer will handle the misdemeanor trial. Also during the discussion, the client states that he would like to sue the government for false arrest, and the lawyer merely listens and never agrees to file such a suit.

The client leaves the office believing that the lawyer has agreed to handle all aspects of the case, including a civil suit, and the lawyer believes he has agreed only to handle the misdemeanor trial. If the retainer agreement is merely silent about the civil suit, it's possible that the client's different understanding may continue.

If, however, the agreement included a clear disavowal of any responsibility to participate in any potential civil litigation relating to the incident, the client can then press the point. In that event, the lawyer may decide that he is willing to file suit and can discuss the fee he wants for expanding the representation. Or he may tell the client he's not interested. The client can then make an informed decision whether to go ahead with having the lawyer handle the misdemeanor case only, or he may decide to shift the whole matter to another lawyer. All of these possibilities are better than letting diverse understandings fester, only to surface months or years later.

As the professional in the relationship, it's the lawyer, not the client, who must take steps to ensure there is clarity on both sides. This benefits the client and the lawyer. It should be part of a law firm's risk management practices to reach such clarity—and then include it in the retainer agreement.

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