



ISSUE: DEFINING THE SCOPE OF REPRESENTATION IS A NECESSARY ELEMENT OF ANY ATTORNEY-CLIENT RELATIONSHIP

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RISK MANAGEMENT NOTE:

Many legal malpractice cases derive from a dispute over the scope of the attorney's representation of a client. Claims could be avoided or at least made very defensible if the scope of the legal representation was tightly defined in a writing. Indeed, in the absence of a written understanding, courts will often imply duties to represent or advise a client regarding collateral matters. Thus, a written confirmation of the scope of legal representation is necessary to limit the extent of the attorney's duty and prevent future disputes.

Many a legal malpractice case has its origin in a dispute over the scope of the attorney's representation of a client. In a business or real estate transaction a client may assume that his attorney is going to take care of certain details or investigation -- or at least claim after the fact that he thought the attorney would have taken care of an unanticipated problem that arose. A tax client may seek redress against his lawyer for a problem that wasn't within the lawyer's conception of the issues she was addressing. A litigation client may later complain that his lawyer didn't file suit against an unrelated party who was a defendant in the suit the lawyer brought.

In these situations, claims could be avoided or at least made very defensible if the scope of the legal representation was tightly defined in a writing. Indeed, in the absence of a written understanding to the contrary, courts will often imply duties to represent or advise a client regarding collateral matters. Thus, a written confirmation of the scope of legal representation is necessary to limit the extent of the duty of the attorney and prevent disputes over whether a given aspect of legal representation is within the scope of representation or collateral to the attorney's undertaking.

In many cases an attorney has been held liable or potentially liable where the scope of representation was not so limited. For instance, an attorney handling a wrongful death action involving a motor vehicle accident was held to have been obliged to advise the client of a potential medical malpractice case. *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. 1978). An attorney handling a workers compensation matter was required to advise the client concerning a possible a third-party action and the need to retain other counsel. *Keef v. Widuch*, 321 Ill. App. 3d 571, 747 N.E.2d 992 (2001).

Similarly, in *John Doe v. Hughes*, 838 P.2d 804 (Alaska 1992) it was held that an attorney was obligated to advise her client in an adoption matter about provisions of the Indian Child Welfare Act which could affect the adoption. In *Barnes v. Turner*, 278 Ga. 788, 606 SE 2d 849 (2004), the Supreme Court of Georgia held that an attorney in a commercial transaction was obligated to advise her client four years later that financing statements had to be renewed.

ABA Model Rule of Professional Conduct 1.2 applies to any limitation of representation. Under Rule 1.2(c) “a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent”. The issue of collateral matters within and without the scope of representation is something that should be specifically discussed when the attorney is retained, the client’s understanding and consent obtained, and then the discussion should be confirmed in writing. This writing should include the advice that the client may seek other legal representation on excluded matters and advice as to the applicable period of limitations if the excluded matters involve litigated claims.

When this is done, an attorney can avoid later liability. In *Heller v. Donaldson*, 1998 Mich App. LEXIS 2505 (Mich. 2005), summary judgment was granted and affirmed on appeal for an attorney sued by a former client for matters specifically excluded under the engagement letter. The attorney expressly limited the scope of representation to a specific business dispute and advised that she would not render any opinion with respect to a possible malpractice claim against a former attorney. The engagement letter advised the client to consult separate counsel the client had previously retained for that matter.

In *Lerner v. Laufer*, 359 N.J. Super. 201, 819 A. 2d 471 (App. Div. 2003), the attorney was asked to review a proposed settlement agreement in a divorce case mediated by the parties. The attorney expressly advised that he did not investigate the basis of the proposed settlement and therefore could not comment upon its fairness or equity. He offered only proposed language changes, and the trial court, finding that this limitation of representation was effective, granted summary judgment which was affirmed on appeal.

In *Indianapolis Podiatry, P.C. v Efroymsen*, 720 N.E.2d 376 (Ind. App. 1999), it was held that the attorney may limit the scope representation if the client consents after consultation. The law firm was retained to represent a podiatry practice in a claim against a former podiatrist. The representation could have potentially involved a claim against a former client of the law firm, a hospital, where the podiatrist started a new practice. The lawyer advised that no claim would be prosecuted against the former client. The court held that the attorney and client may properly limit the objectives of the representation to specific claims and not others as long as the limitation was based on full, objective disclosure and unbiased advice, noting that the extent of disclosure is comparable to that needed in the event of a conflict of interest. The legal malpractice case filed against the law firm by the podiatry group was dismissed on summary judgment for this and other reasons, which was affirmed on appeal.

Issues may also arise if the client asks the attorney to consider additional claims following the initial engagement. New matters not within the scope of the initial representation must be discussed in writing with advice concerning disposition. If the attorney is not going to represent the client in the new matter discussed, a letter to this effect must be furnished to the client advising that no representation will be provided, the necessity to seek other counsel and any applicable period of limitations or other time requirements.

In general an attorney must define the scope of representation in three ways:

1. An engagement letter should discuss what matters or issues are being addressed and also indicate collateral matters in which the attorney will not be involved. These matters must be described and discussed fully with the client at the outset of the representation.
2. The engagement letter should advise the client to seek other legal representation

on excluded matters and further advise concerning any applicable statute of limitations or other time requirements.

3. The client must consent to the exclusion of these collateral matters from the scope of representation. If the attorney cannot fulfill the objectives of the legal representation decided upon, the prudent course is to decline the representation.

Following these steps can properly limit the scope of representation – and also exposure from legal liability claims.

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