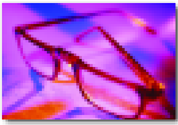

Limited Representation and Your Engagement Letter

A recent New York case declining to find malpractice liability on the part of a law firm[1] points up the importance of properly defining the scope of a lawyer's representation in the engagement letter. In previous columns, we examined the basis for limiting the scope of representation as well as several examples of situations where that occurs.[2] We also saw examples of what can happen when a lawyer does not clearly express the limitation and the client believes he is entitled to a broader representation than the lawyer intends to provide.[3] Limited-scope representation has gotten a lot of attention lately and will continue to be a subject of concern in lawyer–client relationships.[4]

In *AmBase Corp.,* the defendant lawyers represented a subsidiary corporation that was the surviving entity after its parent liquidated and dissolved. As part of the liquidation of the parent, the subsidiary, AmBase Corporation, agreed to pay all of the parent's liabilities above and beyond amounts held in a liquidating trust fund provided for that purpose. One of the claims against the parent was for a federal tax deficiency based on its failing to withhold interest payments to a related entity.

In defending against the IRS assessment for more than $20 million, the defendant lawyers' engagement letter provided for a "success fee" calculated at 150 percent of the lawyers' billed time, subject to a $2 million cap, and stated that AmBase had engaged the lawyers to represent it "to resolve the tax issues currently before" the IRS. The lawyers were successful in defeating the IRS assessment in its entirety but, when they sent a bill including their "success fee," AmBase countered with a claim of malpractice, claiming that the lawyers had failed to advise it that its liability was arguably only secondary to another entity, that the lawyers were accordingly negligent in not deflecting that liability to that entity and that AmBase had been damaged as a result.

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The New York Court of Appeals, after pointing out that AmBase had previously admitted that it would be paying any amounts eventually determined to be due on the assessment, pointed to the terms of the engagement letter and the language limiting the scope of the lawyers' representation to the enforceability and amount of the IRS assessment.[5] The court dismissed the lawsuit.

The ethical rules that apply to the limitation of what a lawyer can do for a client are found in ERs 1.2(c),[6] which allows a lawyer to limit the scope of the representation if it is reasonable under the circumstances and the client gives informed consent; 1.4(b), requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, including the pros and cons of a limited-scope representation; and ER 1.5(b), requiring that the scope of the representation be communicated to the client in writing.

When drawing up your engagement letter, keep in mind that there is authority to the effect that a lawyer must fully advise his client on all aspects of a case unless he specifically limits the representation and fully advises the client of the potential consequences of that limitation.[7] An example of this is found in worker's compensation cases where the lawyer, thinking he is only representing the client in his claim for such benefits, is held to have been negligent in not recognizing, advising the client of, and pursuing a third-party claim for damages against an entity responsible in whole or in part for his client's injuries.

In short, if you believe there may be issues in your client's case that you do not want to handle or do not feel you are competent to pursue, you need to state that in your engagement letter and make sure the client understands the consequences of the representation as limited.

Remember that your explanation of the consequences of limiting your representation, including the wisdom of the client seeking separate representation from another lawyer on an issue you do not feel competent to handle, can be set forth in the same engagement letter that sets forth your fee schedule and the scope of the representation. And it could be very helpful later in the event the client claims you should have done more for him than you were hired to do.[8]

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endnotes

1. *AmBase Corp. v. Davis Polk & Wardwell,* 866 N.E.2d 1033 (N.Y. 2007).
2. *Uncovering Opportunities by Unbundling Services,* ARIZ. ATT'Y, Feb. 2003, at 10; *Limited Representation Revisited,* ARIZ. ATT'Y, June 2006, at 8.
3. David Dodge, *Didn't I Explain That To You? What You Don't Tell a Client Can Get You in Real Trouble,* ARIZ. ATT'Y, May 2001, at 20.
4. Three articles on the subject appeared in the 2004 Symposium Issue of THE PROFESSIONAL LAWYER: James M. McCauley, *Unbundling Legal Services: The Ethics of "Ghostwriting" Pleadings for Pro Se Litigants,* at 59; McCauley, *Some Basic Ethical and Practical Rules Relating to Unbundling of Legal Services,* at 63; and Barrie Althoff, *Ethical Issues Posed By Limited-Scope Representation: The Washington Experience,* at 67.
5. 866 N.E.2d at 1037.
6. Rule 42, ARIZ.R.S.CT.
7. *See, e.g., Nichols v. Keller,* 19 Cal. Rptr. 2d 601, 609-610 (Ct. App. 1993) (if lawyer undertakes to limit representation, he must make consequences "very clear" to the client) and *Berggreen v. Gordon,* 1994 W.L. 700244 (N.D. Ill. 1994) (following *Nichols v. Keller,* 19 Cal. Rptr. 2d 601 (Ct. App. 1993), holding that a lawyer should volunteer advice when necessary to further a client's legal needs, including any apparent legal problems and the need for other counsel, if appropriate).
8. *See Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 827 N.Y.S.2d 231, 235 (App. Div. 2006).