

Editor's note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors Mayer Brown, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

RETAINER LETTER

The retainer or engagement letter is critical in risk management: it enables solicitors to precisely define the scope of their engagement, manage the client's expectations and reduce the risk of any misunderstanding. For criminal matters, it is mandatory for solicitors to have written retainers under Rule 5D of the Solicitors' Practice Rules (Cap.159H).

Identify the client

- It is essential to specify who the client is in the retainer letter to avoid representing an unintended party. These 'inadvertent clients' can cause a firm to be conflicted out of matters or worse, result in claims against a firm for failing to look out for the interests of an unintended client.
- At the same time, it is equally important to specify the party which the firm does not represent. For example, when the firm only represents a company and not its shareholders, or the firm only acts for the mortgagee and not the mortgagor in a mortgage transaction. To avoid misunderstanding the retainer should identify that a class of persons are not to be regarded as 'clients', e.g. shareholders, holding or subsidiary companies, beneficiaries of a trust or a class of beneficiaries.
- If a solicitor will be acting for joint clients, the retainer letter should explain how confidential information will be received, held and shared, and what will happen if a conflict subsequently arises between the clients.

Scope of service

- The extent of a solicitor's duties depends upon the terms and limits of the retainer, and any duty of care to be implied must be related to what the solicitor is instructed to do (*Midland Bank Trust Co Ltd. v Hett, Stubbs & Kemp* [1979] Ch 384). Therefore, the scope of service should be clearly and concisely set out in the retainer letter.
- The above is especially important where the retainer is limited. A precise matter description is crucial and it is advisable to spell out what work is not within the scope of service (e.g. not advising on stamp duty implications in a conveyancing transaction). So-called "general representations" should be avoided, as they can be unlimited in duration and scope and can give rise to conflicts and other disputes concerning the scope of duty assumed.
- Despite the above, one should note that it may sometimes be implicit in a retainer for the solicitor to advise on matters which are reasonably incidental to the work on which he/she is retained.
- Professional services provided by solicitors do not normally involve the guaranteeing of a result by the

solicitor. Therefore, language which may be interpreted as a promise by the firm to achieve a particular result for the client should be avoided in the retainer letter.

- Firms should be aware of the possibility of "scope creep" as the nature of the retainer often changes. If there is any change to the scope of services, it should be updated to the client in writing, and the client should be asked to consent to the extension of scope.
- It is also recommended that the retainer letter set out the fee earner(s) responsible for working on the matter along with fees rate and how and when any such rates will be reviewed.

Stop-work clause

- Principle 5.22 of the Hong Kong Solicitors' Guide to Professional Conduct (the "**Guide**") provides that, "*Unless otherwise provided in a written retainer, a solicitor must not terminate his retainer with his client except for good reason and upon reasonable notice, or with the client's consent*".
- As such, the grounds upon which a solicitor is entitled to terminate a retainer should be expressly stated in the retainer letter.

Fees/ billing arrangements

- Lack of clarity regarding fees can lead to subsequent disputes with clients.
- The retainer letter should specify whether the client is to be charged on a fixed fee or hourly rate basis. If a solicitor agrees to charge an "agreed fee" for specified work, such agreement with the client must be recorded in writing (Principle 4.02 of the Guide).
- If clients are required to make payment(s) on account of profit costs and/or disbursements, such obligation should be clearly mentioned in the retainer letter.
- Principle 4.08 and commentary 1 of the Guide provide that a firm which wishes to render interim bills must have obtained the client's agreement and document such agreement in writing (otherwise the firm cannot sue for its profit costs until the relevant work is completed and a bill is rendered). Therefore, it is important to include such "billing arrangement" in the retainer letter.
- When a client's failure to pay the required costs on account or the interim bill entitles the solicitor to terminate his retainer, this should clearly be stated in the retainer letter.
- According to Rule 7(a)(iv) of the Solicitors' Accounts Rules (Cap.159F), money in a firm's client account may be drawn for payment of the firm's costs where a bill has

been delivered to the client and the client has been notified that money held for him will be applied in satisfaction of such costs. Therefore, firms should consider including provisions regarding how bills are delivered (and/or deemed to be delivered) and how notice is given (and/or deemed to be given) in the retainer letter.

Limitation of liability

- Practice Direction M provides that it is not acceptable for a solicitor to attempt to exclude all liability to a client.
- Section 59(2) of the Legal Practitioners Ordinance (Cap. 159) (“LPO”) provides that a provision in an agreement of fees in contentious business that a solicitor will not be liable for negligence or that he will be relieved from any responsibility to which he would otherwise be subject as a solicitor, will be void. Section 2(1) of the LPO says that “*contentious business*” includes “*any business done by a solicitor in any court whether as a solicitor or as an advocate*” and “*non-contentious business*” includes “*any business connected with sales, purchases, leases, mortgages and other matters of conveyancing*”. When determining whether a business is contentious or non-contentious, the relevant questions are not solely whether litigious proceedings have been commenced and whether the business is being done in those proceedings, and one should consider the particular nature of the work involved and whether it is done in contemplation of any legal proceedings.
- Solicitors may seek to limit their liability to clients (except for liability for fraud or dishonesty) for non-contentious matters provided that:
 - (a) they have in full force and effect valid professional indemnity cover under the Solicitors (Professional Indemnity Rules (Cap.159M) (the “**Rules**”); and
 - (b) the limitation of liability for any one claim is not below the limit of indemnity available for any one claim pursuant to the Rules in force at the date the limitation of liability is agreed.
- Such “limitation of liability” provision should be set out in the retainer letter. The firm should consider whether the cap on liability is fair and reasonable – the limitation must comply with, *inter alia*, the test of reasonableness set out in the Control of Exemption Clauses Ordinance (Cap. 71).

Client’s express confirmation

- Firms should ensure that their retainer letters are countersigned by their clients confirming that they fully understand and agree to their terms. This is especially important if the retainer letter contains a “limitation of liability” provision.
- If a solicitor states that his/her firm will not work on a matter until the retainer has been countersigned, the solicitor and the firm should not take steps which may contradict this requirement.

Client terms

- At times, a solicitor may be asked by a client to engage on its terms of business. These should be scrutinised with care by the solicitor, in the context of the firm’s ability to comply and to ensure the points mentioned above are incorporated. Generally, to protect the independence of the profession a solicitor should try to avoid entering into a client’s terms of business and, if required to do so, consider whether it contravenes the Guide or common law rules of ethics.