Ethics Watch

Limited Engagement Agreements: An Important Tool for Limiting Liability and Dealing with Conflicts

By Nathan M. Crystal

Two of the major problems lawyers face in practice are malpractice liability and conflicts of interest. However, lawyers have an important, but little understood, tool for dealing with both of these problems—the limited engagement agreement.

What are limited engagement agreements?

A limited engagement agreement is one that specifies the legal tasks that the lawyer will handle and excludes all other activities. Rule 1.2(c) states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The comments give some examples of the use of limited engagement agreements. If a lawyer is retained by an insurer to represent the insured, it would be appropriate for the lawyer to limit the engagement to matters related to insurance coverage. More generally, the comment states that a limited engagement may be appropriate when the client has limited objectives for the representation. Rule 1.2, comment 6. Under the comments a limited engagement may exclude certain means that could otherwise be used to accomplish the client's objectives. Such a limitation would be appropriate if the means would be too costly for the client. A limitation on means can also reflect the lawyer's interest as an independent professional. The engagement may exclude means that the lawyer regards as "repugnant or imprudent." While these examples are helpful, they do not indicate the full range of possibilities for use of limited engagement agreements.

Limiting liability through the use of limited engagement agreements

Lawyers cannot ethically limit their malpractice liability to clients at the inception of the representation. Right? Not exactly. Rule 1.8(h)(1) prohibits a lawyer from entering into an agreement prospectively limiting the lawyer's liability unless the client is independently represented. This exception, however, is unimportant practically because it would be rare for a lawyer to discuss malpractice liability with a client before performing work and even rarer for a lawyer to demand that the client be independently represented with regard to a waiver of malpractice liability. So as a practical matter, lawyers cannot ethically limit their malpractice liability to clients? Not true. Lawyers can do so through the use of limited engagement agreements.

Lerner v. Laufer, 819 A.2d 471 (N.J. Super. App. Div. 2003), is an example of the effective use of a limited engagement agreement to limit the lawyer's liability. In that case the appellate division of the New Jersey Superior Court affirmed summary judgment for the attorney in a legal malpractice case. The husband and wife had participated in a mediation, which produced a proposed property settlement agreement. The mediator recommended that the parties have the agreement reviewed by an attorney and suggested several lawyers, including the defendant. The defendant agreed to review the agreement. His engagement letter stated that he had been employed to review the agreement, that he had not conducted any discovery or obtained any factual information, and that he was therefore not able to render an opinion on the fairness of the agreement. The wife later claimed the lawyer committed malpractice by not investigating the reasonableness of the agreement. The court found that the lawyer did not breach the standard of care expected of attorneys because he had properly limited the scope of his representation pursuant to Rule 1.2(c).

By contrast, *Barnes v. Turner*, 606 S.E.2d 849 (Ga. 2004), is a good example of a situation in which a lawyer could have protected himself from malpractice liability by using a limited engagement agreement, but failed to do so. In *Barnes* the defendant lawyer represented the plaintiff in the sale of his business. The sale price was paid $40,000 in cash at closing and $180,000 over ten years. The note was secured by a blanket lien on the buyer's assets. Turner perfected the lien by filing a UCC financing statement. However, Turner failed to inform Barnes of the need to file a continuation statement when the original statement expired in five years. Unfortunately, the buyer had pledged the same collateral to other lenders, which gained priority over Barnes when the original financing statement expired. The court found that the buyer stated a cause of action against the lawyer for breach of the duty of care because the lawyer failed to protect the buyer's security interest. The lawyer could have complied with this duty by either warning the client of the need to file a continuation statement or by filing the continuation statement himself. The lawyer could have avoided liability through the use of a limited engagement agreement. For example, the agreement could have stated: "This representation is limited to the closing of the sale and the filing of any documents necessary to the closing, and does not extend to any future activities, including the filing of any documents. While this engagement agreement does not cover any future filing of continuation statements, we advise you to make

arrangements to file a continuation statement before the expiration of your current financing statement in five years in order not to lose your priority to other creditors."

Using limited engagement agreements to deal with conflicts of interest

Conflicts of interest can arise in various ways, but two of the most common types are conflicts with former clients, governed by SCRPC 1.9, and conflicts with current clients in unrelated matters, addressed in SCRPC 1.7(a)(1). If these rules apply, most lawyers believe that their only choices are to obtain the informed written consent of the affected clients, under SCRPC 1.7(b)(4), or to decline the prospective representation (or withdraw if the representation has already begun) due to the conflict. But there is another choice available for dealing with some (not all) of these types of conflicts—the limited engagement agreement.

Suppose a lawyer is asked to handle a complex matter involving multiple adverse parties. Suppose one of the adverse parties is a current client of the lawyer's firm. The lawyer and his firm cannot undertake the representation against the current client, but could handle the representation against the other parties who are not current clients. The solution: a limited engagement agreement in which the client consents to the firm representing the client against any parties who are not current clients of the firm. Other counsel will be retained to represent the client with regard to claims against current clients of the firm.

An example of the use of the limited engagement agreement to deal with a current client conflict is *Sumitomo v. J.P. Morgan & Co.*, 2000WL 145747 (S.D.N.Y.). In *Sumitomo* the Paul Weiss firm had represented Sumitomo for a number of years. Sumitomo asked the firm to represent it with regard to an investigation and litigation arising from the copper trading activities of one of its agents. Paul Weiss discovered that some of the potential adverse parties were banks that the firm represented in other matters. Paul Weiss advised Sumitomo that it could not evaluate or represent it in connection with any future litigation against those clients. Later, one of Paul Weiss's clients, Chase Bank, moved to consolidate its case with the case against J.P. Morgan and to disqualify Paul Weiss upon the consolidation. The court denied the motion, finding that there was no risk of a taint to the trial from Paul Weiss's representation and that the consolidation did not merge the suits or create adversity between the parties to the consolidated actions.

Ethics opinions in both New York and the District of Columbia have approved of the use of limited engagement agreements to deal with conflicts of interest against both current and former clients. See D.C. Ethics Advisory Op. #343 (2008) (finding that a lawyer may, with the informed consent of the client, limit the scope of representation of the client to prevent the representation from being "substantially related" to the representation of a former client, but warning that it may not be possible to avoid a conflict under the specific set of facts that a lawyer may face); Assn. of Bar of City of N.Y. Comm. on Prof. & Judicial Ethics, Op. #2001-3 (finding "no reason why the client cannot limit the scope of the lawyer's representation to eliminate an adversity between another client and the lawyer, and thereby avoid any conflict"; committee provides examples from both litigation and transactional practice). The Restatement of the Law Governing Lawyers (2000) also recognizes that a lawyer may limit the scope of the representation to avoid conflicts with former clients (§132, cmt. *e*) and with current clients (§121, cmt. *c(iii)* and illus. 4).

Limited engagement agreements must be reasonable under the circumstances

The use of a limited engagement agreement is not unlimited. Comment 7 states that the limitation "must be reasonable under the circumstances." If the client's objective is to secure general information about a legal problem, the parties could agree that the engagement is limited to a brief telephone conversation. However, a limitation would "not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely."

Limited engagement agreements must be used with caution because the rules of ethics require that they be reasonable under the circumstances.

In *Flatow v. Ingalls*, 932 N.E.2d 726 (Ill. Ct. App. 2010), the defendant lawyers and their firm had agreed to represent the plaintiff with respect to the defamation claim in a four-count complaint that the plaintiff had brought against his former employer. The limited engagement agreement provided that the firm would draft a motion for summary judgment and a reply brief with respect to that claim. In response to the motion for summary judgment, the employer filed a cross motion for summary judgment to which the firm did not respond. The court subsequently granted the employer's motion. The client then sued for malpractice, claiming that the lawyer breached a duty of care by failing to respond to the employer's motion for summary judgment. The Illinois Court of Appeals found that summary judgment should have been granted for the law firm because of the limited engagement agreement. While *Flatow* is an example of the successful use of a limited engagement agreement to minimize liability for malpractice, I question the decision. A limited engagement must be reasonable under the circumstances. While it is probably permissible to

have a limited engagement agreement that applies to a particular claim in a multi-claim lawsuit (or to a particular aspect of a business transaction, the tax aspects for example), I do not think it is reasonable to limit the representation to a portion of a motion, as was done in *Flatow*.

Drafting the limited engagement agreement

Under general principles of contract interpretation, an engagement agreement prepared by the lawyer will be construed against the lawyer in case of ambiguity. Therefore, lawyers must be careful in their drafting of the limited engagement agreement. In my opinion three aspects are crucial. First, the agreement should clearly state that it is a "Limited Engagement Agreement." Second, the agreement should specify the matter and the services that the lawyer will render with respect to that matter. Third, the agreement should have a general provision excluding from the agreement any services not specifically covered by the engagement. Without limiting the generality of this exclusion, the agreement should specify those excluded services for which there might be doubt as to whether they are covered by the agreement. For example, in *Barnes v. Turner*, the exclusion section of the agreement should specifically state that the engagement does not cover any future filings including continuation financing statements.

Conclusion

Limited engagement agreements must be used with caution because the rules of ethics require that they be reasonable under the circumstances. Nonetheless, limited engagement agreements are an important tool that lawyers can use both to limit their liability for malpractice and to deal with some types of conflicts of interest. In fact, in my opinion all engagement should be pursuant to a limited engagement, unless the client wishes to engage the firm generally and is willing to pay a general retainer for this privilege. ■

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