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Avoiding unintentional expansion of retainers

Here's the scenario: A lawyer is retained to assist a client with a tort claim and an accident benefits claim. The client, meanwhile, has been informed that the long-term disability (LTD) benefits provided by her employer's group plan are about to be terminated. In an effort to forestall the termination of benefits, she asks the lawyer to send a copy of a medical report that the lawyer has on file to the LTD insurer. The lawyer does so, enclosing a cover letter that reads "my client has requested that I forward the enclosed to your attention."

After the tort litigation has concluded, the time for pursuing an LTD claim lapses. The client then alleges that the lawyer was supposed to be representing her with respect to pursuing the claim for LTD benefits. The lawyer asserts that dealing with the LTD insurer was never part of the retainer, and points to the written retainer letter, which refers only to the tort and accident benefits claims.

Can the lawyer be found to have been retained to handle the LTD claim? LawPRO claims counsel Yvonne Diedrick warns that the answer may sometimes be yes.

Not all retainers are in writing, and there is no reason why a lawyer and client could not agree to a change in the retainer without putting that change into writing. The danger for lawyers lies in situations where the client assumes (mistakenly) that something the lawyer has said or done amounts to an agreement to expand the retainer.

Diedrick points out that the LTD benefits example cited above is only one of many possible scenarios in which a client can misunderstand the scope of a retainer. For example, corporate lawyers who never litigate might discover that a client has assumed that they will handle litigation arising out of a corporate transaction; or a client working with a lawyer to resolve a return-to-work issue might assume that the lawyer will also take responsibility for filing an action against the employer or against a benefits provider.

In the previous (December 2012) issue of this magazine, claims counsel Jordan Nichols explained how careful management of the retainer process can help lawyers avoid communication-based claims. Diedrick recommends that, in addition, lawyers revisit the scope of the retainer with the client when appropriate.

When might a review of the retainer be appropriate?

Sometimes the unexpected expansion of a retainer arises when a new issue emerges and the client brings that issue to the attention of the lawyer – whether or not the lawyer commits to acting on the new information. In the personal injury example above, the client presumably told the lawyer that she'd received some kind of notice of a change to her benefits, and asked the lawyer to do the favour of forwarding the medical report. In a situation like this, a useful approach might be for the lawyer to confirm to the client (in writing) that the report has been sent, and in that communication, to include a reminder that the lawyer has not been retained to handle the LTD issue. Should the client wish for the lawyer to act in this regard, the lawyer may request additional written instructions.

Of course, a lawyer cannot anticipate every possible incorrect assumption that a client might make. It would be going much too far to suggest that any communication of new information from any client should prompt a restatement of the terms of the retainer, or to suggest that any of the above examples mean that the lawyer has been negligent. We're simply suggesting that maintaining good general two-way communication throughout the course of a matter can reduce the potential for misunderstandings. It can also help to occasionally consider the professional services you provide from perspectives other than your own. Is there anything you've said or done that might lead a client (or a third party) to assume you will be performing work you have not agreed to do? You may think it's obvious that, as an IP specialist, you aren't thinking about the client's tax exposure or franchise disclosure obligations… but to some clients, a lawyer is a lawyer. Be clear. ■

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Correction and Apology

The case book column at page 41 of the August 2012 edition of *LawPRO Magazine*, "Lessons learned: The Limitations Act 2002," contained a summary of the case of *Isailovic v. Vojvodic* (2011 ONSC 5854 (CanLII)). Due to the placement of names in the style of cause, one could have concluded that Vojvodic represented the plaintiff when the alleged improvident settlement was signed. In fact, the plaintiff was represented by another lawyer at the time of settlement. We apologize for any negative implication on the reputation of lawyer Vojvodic which this article may have caused.