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The non-engagement letter

by Gianna Di Stefano, PII Risk Manager



Whilst it is obvious that a letter of engagement should be sent to a client after receipt of instructions for a new matter, the use of the non-engagement letter to non-clients should also be utilised whenever a practitioner is unable to accept instructions.

It is a useful risk management tool and sends a clear message to the prospective client when the practitioner is not representing him or her. It could be valuable evidence should a dispute arise later.

The cost of defending proceedings in order to prove that you were not retained, did not act or advise can be an expensive and stressful experience. There have been a number of instances in recent years where claims and proceedings have been brought by non-clients against a practitioner, asserting that they had engaged the practitioner and that the practitioner had then failed to provide advice.

Law Claims recently successfully defended such a claim in a District Court action, and although costs were awarded against the plaintiff, we were unable to recover our significant costs due to the plaintiff's dire financial situation.

The plaintiff sued the insured practitioner for damages after having lost money in an investment. The plaintiff alleged that the practitioner was acting for her. The plaintiff also asserted that the practitioner had failed to finalise and have in place an agreement prior to the plaintiff advancing monies to a company which later became insolvent.

By way of background, the practitioner was initially instructed by his client (the man in whose company the plaintiff invested) in relation to a Franchise Agreement. The practitioner entered a formal 'Solicitor and Client Agreement' with his client and provided some advice.

Subsequently, the client instructed the practitioner that he had agreed with the plaintiff that she would invest a sum of money in his company, and be granted shares. The plaintiff was also to become an employee. The practitioner prepared a draft Employment Agreement, and a draft Agreement regarding the investment.

The client then arranged with the practitioner to meet regarding the draft documents. The client said that he wanted to bring the plaintiff to the meeting. The practitioner advised against that, but the client insisted. The plaintiff came with the client to the appointment. During that meeting the practitioner specifically told the plaintiff that he could not do any work for her or advise her, because of the conflict of interest, and that she should obtain independent advice. The plaintiff responded by saying that she understood that, and as she had an Uncle who knew lots of solicitors it should not be a problem to obtain advice from another solicitor.

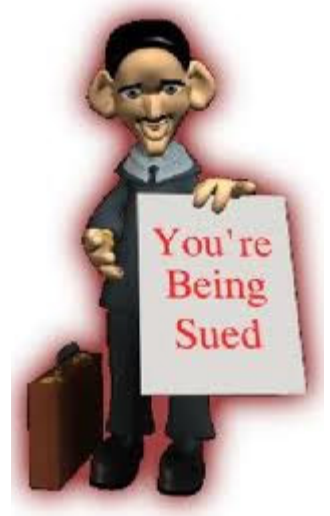
The documents were not finalised at that meeting. Shortly thereafter the practitioner became ill. He received several phone calls from the plaintiff asking what was happening with the Agreement. He told her that he was unable to do any work and that she should engage her own solicitor to finalise the document. On at least one occasion the plaintiff told the practitioner that she understood that.

Subsequently the plaintiff asserted that the practitioner had acted for her in the matter, and had failed to look after her interests. She denied that the practitioner had told her that he could not act for her.

The practitioner had never established a file in the plaintiff's name nor rendered any account to her. Consequently, he denied that he owed the plaintiff any duty of care. He acknowledged that he could not say anything to the plaintiff about the risks of the proposed investment, given that it was his duty to protect the interests of his client, and given that he had explained to the plaintiff that it would be a conflict of interest for him to also act for her and that she should obtain her own advice.

At trial, the issues for determination were as follows:

1. Did the practitioner owe the plaintiff a fiduciary duty on the basis that:
 - a. He acted for her on a retainer, or
 - b. He owed a fiduciary duty?
2. If the practitioner owed the plaintiff a fiduciary duty, did he breach that duty by:
 - a. Not preparing a document to protect her investments, or
 - b. Not advising her against the investment at all, or at least until the practitioner's client had executed a document protecting her interests?
3. If the practitioner breached fiduciary duty to the plaintiff, had the plaintiff suffered damages?



In this case there was no non-engagement letter. Fortunately, findings of credit in respect of the opposing claims whether the client was acting for the plaintiff or not were made in favour of the practitioner. It was held that the practitioner owed no fiduciary duty to the plaintiff as he was not acting for her, and he tried to make that clear to her. The plaintiff's claim was dismissed.

It would have been preferable for the practitioner to have written to the plaintiff confirming his advice that he was not acting for her and recommending that she obtain independent advice. The production of such a letter may well have persuaded the plaintiff at the outset from pursuing her claim.

Such a non-engagement letter is invaluable for the practitioner who may be faced with a professional claim by an unhappy prospective client who may claim later that by talking to the practitioner the client believed that a matter had in fact been accepted for handling by the practitioner.

Law Claims suggests that the use of non-engagement letters should form part of practice and should address the following:

- The date that the practitioner was contacted or met with the prospective client, or the other unrepresented party in the matter on which the practitioner has already been engaged.
- Summarising the matter for which the practitioner / firm was consulted and a clear statement that the practitioner / firm will not be acting for the prospective client or other party.
- A statement that the non-engagement should not be taken as an expression of opinion as to the merits of the prospective client's claim.
- An indication that a fee is not being charged (if appropriate to the nature of the contact).
- The prospective client should be advised about any time limits applying to the case and the penalty for missing such deadlines with advice to the prospective client to make prompt and immediate arrangements to secure another practitioner if the prospective client wishes to proceed further with the matter.
- Return any original documents given to the practitioner / firm during the consultation with the prospective client.
- Enter information about prospective clients into the firm's database so that future conflicts can be avoided.

It goes without saying but ensure a copy of the non-engagement letter is kept to defend any claim of representation later down the track.

For any queries about this or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.

Level 3, 132 Franklin Street, Adelaide,
South Australia, 5000
DX 400, Adelaide
T (08) 8410 7677 • F (08) 8231 7798
W lawsociety.sa.asn.au