

Summary**

Guidelines for Lawyers Providing Unbundled Legal Services – “Consider Retain Manage”

A. When should practitioners *not* accept limited retainers?

1. If you have a concern that it is inappropriate to limit the retainer in the circumstances.
2. If you think that your client does not understand the implications of entering into a limited retainer.
3. If you think that you cannot act because it would be difficult or impossible to take full instructions.

B. When should practitioners accept a limited retainer

1. If you have considered the higher level of risk that limited retainers inevitably bring; and
2. If you have established clear self-defensive measures from the outset, including a written retainer agreement.

C. Ethical and professional duties practitioners should consider include:

- The practitioner’s ability to discharge obligations to the court and the administration of justice under a limited retainer agreement
- The practitioner’s ability to discharge any or all of the duties stipulated under the professional conduct rules
- The practitioner’s ability to discharge the duty of care to the client under a limited retainer agreement
- The practitioner’s ability to discharge contractual, fiduciary and tortious duties arising from a limited retainer agreement
- The obligation to explain to the client any costs implications, especially any liability for adverse costs orders.
- Advocacy obligations
- Solicitor’s obligations
- Special obligations with respect to criminal law matters
- Special obligations with respect to family law matters
- In litigation matters, the obligation to explain the meaning of case management objectives

D. Additional matters practitioners should consider include:

- Whether it is possible to limit the practitioner’s liability
- The impact of proportionate liability and the Civil Liability Act
- Whether any proposed clauses in any retainer agreement could potentially make the proposed retainer agreement into an unfair contract and thus void under the Australian Competition and Consumer Act
- The practitioner must consider the professional indemnity insurance implications of regularly accepting limited retainers. The practitioner should make disclosure to the insurer of this practice.

E. The retainer agreement must always be in writing and should include:

- An accurate and precise description of the scope of legal services to be rendered making it clear that the practitioner is only agreeing to act within the scope of services stipulated in the agreement
- Whether it is possible for the practitioner to perform the limited retainer
- Whether it is necessary to incorporate provision for interacting with the other practitioner(s) acting for the client
- Whether the practitioner is required to limit communications exclusively to the client, or whether communications to the other practitioner(s) acting for the client is permitted or required
- Whether any special provision must be made to protect the client’s legal professional privilege
- Whether any conflicts of interest are likely
- Whether the practitioner will be responsible for accepting service of process and other documents including court documents and the obligations that flow from that
- In the case of court appearances, whether the practitioner will act as an advocate or an instructing solicitor
- Any costs implications, including the client’s liability under adverse costs orders
- The availability of a complaints procedure

- An acknowledgement that the client is aware of the limitations of the retainer and the possible impact on any advice given
- The practitioner having the ability to seek further information from the client from time to time to the extent that it is reasonably necessary for the practitioner to render the services required
- A requirement that any request to a party for further information should be communicated to the client in writing
- The client being at liberty to take independent advice in relation to the provisions of the limited retainer agreement

F. Manage the limited retainer agreement

Once the retainer agreement is in place practitioners should:

- Ensure that explanation of the scope and terms of the limited retainer are recorded in writing in a contemporaneous file note and immediately afterwards confirmed by letter or email (or both) to the client
- Take special care to proactively manage the limited retainer relationship from the beginning to the end, so that there is no room for a misunderstanding or a dispute later with the client
- Regularly refer the client back to the terms of the limited retainer document, for example, when explaining that certain aspects of work are not covered by the terms of the limited retainer
- Be wary of rendering legal services that, by conduct, without express agreement, have the legal effect of expanding the scope of the limited retainer
- (where the client requests additional services be performed by the practitioner) inform the client that it is outside the scope of the retainer and that the practitioner is not obliged to render the additional services. The practitioner may negotiate an additional retainer with the client to perform the additional services.