

# Guidelines to Completion of Engagement Letter

(for Litigated Matters)

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**DISCLAIMER:**

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**Note 1:** Before you send an engagement letter to a client you should firstly ensure that accepting the instructions and the sending of the agreement has been properly authorised by the law practice following a client screening and conflict checks. A record of the screening and conflict checks undertaken should be placed on the client file.

**Note 2:** When dealing through an agent, you should ensure the agent has the authority to bind the client(s) to the agreement. A director does not ordinarily have authority to bind a company unless he or she is the managing director. Particular care must be taken where the authority of the person is or may be in issue.

**VAR 1** – name of law practice - insert the legal entity i.e. sole practitioner, partnership or incorporated legal practice (ILP). You may also identify any trading name (e.g. ABC Pty Ltd trading as First Class Lawyers).

**VAR 2** – name of client - Be sure to correctly identify the client(s) for whom legal services are to be provided. We recommend you utilise a client identification checklist to ensure you do so.

**VAR 3** - name of dedicated legal practitioner – this is the practitioner who is responsible for client management and that all parties abide by the terms of the engagement agreement.

**VAR 4** – This should clearly outline what legal services the client has requested the law practice to undertake on his/her/their behalf. These instructions should subsequently be fully set out in an initial letter of advice (sent after this offer has been accepted).

Care should be taken to accurately identify the legal services to be provided with as much specificity as the circumstances permit. This reduces the prospect that the retainer might subsequently be held to be wider than was intended.

**VAR 5** - This should state (again, with as much specificity as is practicable), the services which you have agreed to provide.

Practitioners need to be mindful of Solicitors Conduct Rule 7: A client must understand the legal issues and be provided with advice to assist the client to make informed choices. That advice must include advice about alternatives to fully contested adjudication of a dispute i.e. alternative dispute resolution processes.

If the instructions relate to particular court or other proceedings, they should be identified. Further proceedings may require a separate agreement.

If the scope of the retainer is to be limited or confined in any way, this should be clearly stated. For example:

- (a) If the client has specifically instructed the law practice not to undertake certain work or imposed conditions, such as strict timeframes or cost restrictions, these should also be clearly outlined.
- (b) You should also consider if there is any type of advice that may be required that your law practice is unable or unwilling to provide e.g. taxation advice. Any such limitation should also be clearly outlined.
- (c) If the client does not want advice on any particular issues, this should be clearly stated.

**VAR 6** – delete either ‘claim’ or ‘defence’.

**VAR 7** - insert when acting for a plaintiff/applicant and delete either ‘plaintiff’ or ‘applicant’.

**VAR 8** – (contingent on inserting VAR 7) insert any limitation dates, including dates by which elections must be made. If there are no applicable dates, insert “none applicable”. You may need to consider other limitation dates (e.g. election dates; Court imposed time limits).

**VAR 9** – delete either ‘prosecution of your claim against’ or ‘defence of the claim by’.

**VAR 10** - name of other party(s).

**VAR 11** - names and position held of all persons who will assist.

**VAR 12** - insert reference to the applicable determination (and attach a copy to the letter). These costs determinations are found at [www.legalcosts.wa.gov.au](http://www.legalcosts.wa.gov.au). You must choose the most applicable of these.

**VAR 13 to VAR 17** – include the categories of lawyers and employees that are to be utilised on the matter and their hourly rates (delete those categories not required).

**VAR 18** – set out the categories of internal practice charges (and their rate if applicable). Examples of these might be disbursements such as photocopying costs and filing fees.

The way a law practice bills a client for ‘internal’ disbursements is a concern for the Regulator. The Regulator’s view is that many are administrative charges which are not chargeable. They include file opening fees, archive fees, file closing fees and general administrative charges, also general charges for postage, petties, stationery, printing, facsimiles and emails (where the cost has not actually been incurred or is not accurately identified), and secretarial time, petrol and car maintenance charges.

**VAR 19** - insert estimate of total costs based on the rates and disbursements set out in VARs 13 to 18. Use and retain a worksheet or some other record demonstrating the basis of your estimate. The estimate must be a single figure (as per a directive of the Legal Services Council under section 407 of the LPUL). The estimate should be for the scope of the work you have been instructed to carry out. For example, if you have been instructed to act up to and including mediation, your estimate can be for work to that point. If mediation is unsuccessful and the client further instructs you to go to trial, you will need to confirm the change of instructions and provide a new estimate based on those changed instructions.

**VAR 20** - insert estimate of total costs that could be charged under the relevant Determination. Use and retain a worksheet or some other record demonstrating the basis of your estimate.

**VAR 21** – delete ‘prosecuting’ or ‘defending’.

**VAR 22** - insert estimate of costs that could be recovered if successful based on the applicable costs determination. Use and retain a worksheet or some other record demonstrating the basis of your estimate.

**VAR 23** - insert percentage estimate of opponent’s recoverable costs (based on your estimate in

**VAR 19** - to judgment if unsuccessful. By way of guidance, it is usually estimated that the opponent’s recoverable costs will 60% to 70% of the costs the practice charges the client.

An example of a worksheet for VARs 19, 20 and 22 is annexed to these Guidelines (Annexure 1).

**VAR 24** – insert minimum period between interim invoices. You may also wish to consider the right to issue an interim invoice when WIP and disbursements reach a certain level, regardless of elapsed time since the last invoice. This could become important where periods of significant work are required, such as preparing for a hearing, mediation, or trial.

**VAR 25** – the period for payment of the invoices rendered (e.g., 21 days)

**VAR 26** and **VAR 27** – use the alternative paragraph where instructions are to be given by a person (as named) other than the client.

However, you should consider if both the client and the other person are able to give instructions (which is not recommended as it can give rise to conflicting instructions).

Further, you may wish to make it a requirement that if the client wants to withdraw the authority of the other person, they do so in writing.

**VAR 28** – only insert if you require a deposit on account of costs. This clause means that the client's acceptance of the offer (and the practice's willingness to proceed) is contingent upon that deposit being made. You will need to provide details of your trust account to the client for this purpose. You should do that in a secure manner having regard to the risks of cybercrime.

#### **Further Notes:**

1. Ensure the offer is signed by or on behalf of all clients.
2. When acting for a company, insert the usual execution clause for that company, but also note sections 127-129 of the *Corporations Act*.
3. An auditable record that the practice has considered the charges it is estimated will be billed to the client must be made and retained on the file. A convenient way of producing that record is by reference to the relevant cost determination. Doing so also allows the practice to appropriately make the other estimates that must be provided to the client. An example of a worksheet for this process is annexed to these Guidelines.
4. Practitioners may wish to add an amount for "contingencies".
5. If your instructions are to take the matter only to a particular stage, say mediation, then the estimate should be up to that stage in the litigation. However, we would then recommend a further sentence be included in VAR 5 as follows:  
*"If our instructions are extended past <mediation> (or whatever stage is applicable) then further costs above the estimate set out in section 5 below will be incurred. We estimate those further costs will be <insert figure>."*
6. Any change to the law practice's instructions must be:
  - treated as a variation to these agreements;
  - confirmed in writing; and
  - acknowledged/agreed by the client.

The variation document must provide a written estimate of the costs that will be incurred completing the client(s)' further instructions.

Further if it is proposed to make or resist an interlocutory application not foreseen and therefore not included in the estimates detailed in these agreements then further costs

disclosure should be delivered in relation to the proposed application before the application is issued or resisted.

7. At any time that it is clear that the current estimate of total costs to be charged will be exceeded, you must provide an updated estimate of total costs and recoverable costs. We suggest you calculate this by updating the worksheet (see Annexure 1) that you used to calculate the original or current estimate.
8. If the costs are to be paid (or are guaranteed) by an entity other than the client, then you must consider whether there is a need to:
  - include clauses concerning that entity;
  - have that entity as a party to and execute the agreement;
  - inform the entity that it needs to obtain independent legal advice.

**ANNEXURE 1  
EXAMPLE ESTIMATE WORKING SHEET**

<b>Task</b>	<b>Our time estimate</b>	<b>Scale time</b>	<b>Our rate</b>	<b>Scale rate</b>	<b>Our price</b>	<b>Scale recovery</b>
Writ						
Statement of claim						
Reply						
Requesting particulars						
Giving discovery						
Inspection						
Interrogatories						
Chambers appearances (state number predicted)						
Listing conference						
Mediation						
Offers to settle						
Entry for trial						
Preparation 1. Witness statements; 2. Brief to expert(s); 3. Advice on evidence; 4. Subpoenas; 5. Research (complex only); 6. Complying with trial directions orders; 7. Brief(s) to counsel;						
Trial 1. Counsel fees; 2. Solicitor fees; 3. Clerk fees						
Orders						
Other work (and if so, specify). NB: such work is not recoverable in a party/party taxation						
Taxation						
<b>TOTAL</b>						



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