

Engaging Phase Assistance



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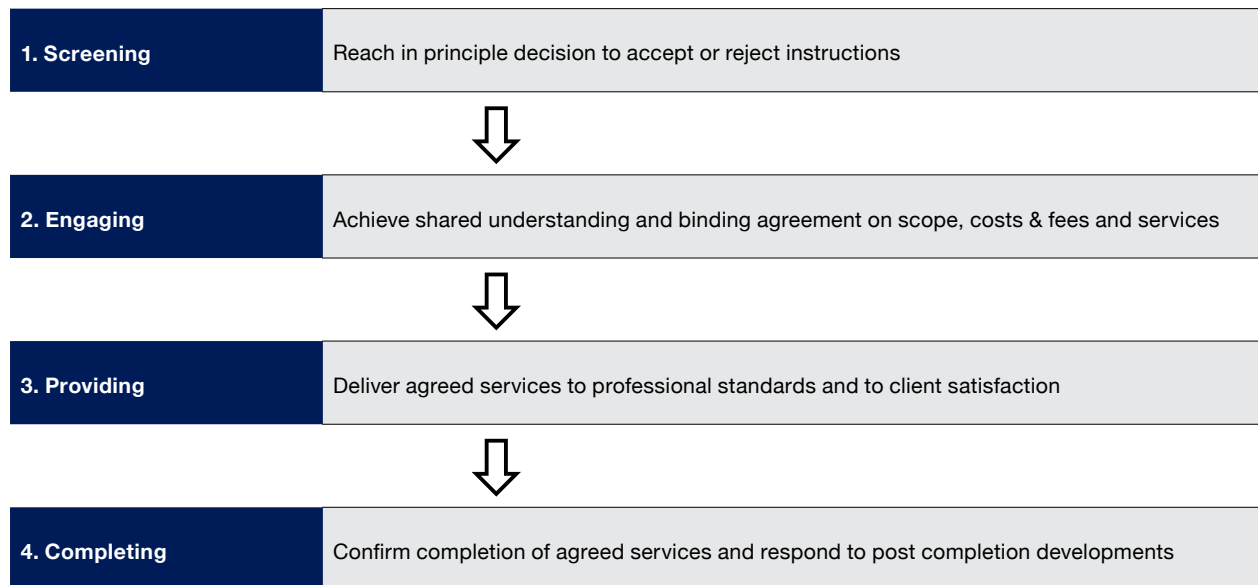
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This Document

This document assists legal practices to meet the Requirements of Law Mutual's Matter Management Guidelines that apply to the Engaging Phase of a Matter.

There are four key phases in the management of a Matter:



To achieve required outcomes, a legal practice must undertake certain Key Activities.

Law Mutual's Matter Management Guidelines provide the Key Activities for each phase and Key Activities that should be conducted during All Phases.

For each Key Activity this document sets out:

Requirement	the specific action that should be taken
Tasks	detailed activities that must be done to meet the Requirement
Guidance	detailed activities that it is recommended be undertaken to meet the Requirement
Controls	management mechanisms to ensure that the detailed activities are consistently carried out to required standards
What could go wrong	examples of what could go wrong if the detailed activities are not carried out to required standards

There are four different types of Controls. The following table provides comments on each type.

Type	Comments
Knowledge	<p>How principals ensure people know and understand the method to meet a Requirement</p> <p>People must know and understand the method to meet a Requirement. This might be done via:</p> <ul style="list-style-type: none"> • training or mentoring (suitable where the method is variable and/or nuanced e.g. method for managing client expectations) • documentation and tools (e.g. procedures, checklists or templates – suitable where the method requires completion of specific tasks) • embedded via business rules into IT systems (e.g. IT system does not allow invoicing until conflicts check completed)
Role clarity	<p>How people know what aspects of the method they are accountable or responsible for, and what aspects lie outside their authority</p> <p>Where people work together, role clarity ensures that the method is implemented by defining who is accountable for an outcome; this is usually a principal or senior lawyer, who is also accountable for:</p> <ul style="list-style-type: none"> • each task that leads to the outcome; and • limits of authority, i.e. who cannot do certain tasks without approval <p>Confusion over who is accountable or responsible leads to errors. Key accountabilities and responsibilities should be documented.</p>
Motivation	<p>How principals motivate people to follow the method through leadership, culture, performance review and other mechanisms</p> <p>Mechanisms to motivate lawyers to implement the method include:</p> <ul style="list-style-type: none"> • demonstrated leadership (i.e. walking the walk) • recognising performance, especially for important tasks that typically go unrecognised e.g. good scoping prior to engagement • aligning performance metrics with the method; i.e. measuring more than billable hours
Assurance	<p>How principals have comfort that the method has been followed</p> <p>Principals should ensure relevant checks, reviews and sign off for higher risk activities:</p> <ul style="list-style-type: none"> • an assurance control might be as simple as requiring initials against a checklist on the file. • some Requirements are so critical for protecting the legal practice that principals require assurance they have been met in every Matter e.g. conducting a conflicts check or ID check.

Controls will vary depending on the size and resources of the legal practice.

In this document:

♥ means a task is considered essential to the effective management of a high risk activity

** means a Toolkit related to that control is available on the Law Mutual website. A toolkit will usually contain:

- further details of Tasks
- templates

Engaging Phase Key Activities

Engaging Phase Key Activities are as follows:

- Understand the potential client's ability
- Understand potential client's objectives and explain options
- Scope services and fees
- Explain course of action, rights, obligations and proposed costs
- Make disclosures and obtain consents
- Complete engagement agreement
- Confirm engagement as required

Details of Key Activities

Understand the potential client’s ability to give instructions

Area	Description
Requirement	<ul style="list-style-type: none"> Gauge the potential client’s ability to give instructions and to receive and act on advice, and adopt an approach to engaging and communicating accordingly
Tasks	<ul style="list-style-type: none"> Sufficiently engage with the potential client to make an assessment If doubts arise as to mental capacity, seek a clinical consultation or formal evaluation by a clinician with expertise in cognitive capacity assessment and taking into account that assessment, make a final decision about mental capacity to provide instructions and receive and act on advice Separate from the question of mental capacity, gauge the potential client’s ability to give instructions and receive and act on advice, and adapt the legal practice’s approach to engaging and communicating accordingly
Guidance	<ul style="list-style-type: none"> Read the Law Society’s guide “When a Client’s Capacity is in Doubt” Apart from mental capacity, the legal practice should consider whether the potential client: <ul style="list-style-type: none"> Is under severe emotional or mental stress due to the nature of the Matter (e.g. divorce) Speaks English as a second language Is aged and/or infirm Ways in which a legal practice might adapt its approach include: <ul style="list-style-type: none"> Fully understand the potential client’s non-legal objectives Engage a translator Take the client through important communication/documents to ensure they understand their meaning The legal practice should monitor the client’s ability over the course of the Matter
Controls	<ul style="list-style-type: none"> Knowledge: <ul style="list-style-type: none"> Ensuring lawyers read the Law Society’s guide “When a Client’s Capacity is in Doubt” Standard instruction form includes prompts to consider potential client’s ability Mentoring on adapting approach to engaging and communicating to the particular needs of clients Role Clarity: A senior lawyer is accountable for assessing the potential client’s mental capacity Motivation: No specific requirement Assurance: A senior lawyer should check to ensure a junior lawyer has appropriately assessed the client’s ability

Area	Description
What could go wrong	<ul style="list-style-type: none">• The legal practice accepts instructions from a client who lacks mental capacity• The legal practice communicates with the client in a way that makes it difficult for the client to give instructions or make decisions• In making its assessment of the potential client's mental capacity, the legal practice discriminates against the potential client• The client has an insufficient understanding of the facts or legal issues when giving instructions or receiving or acting on advice and as a consequence does not act in their own best interest

Understand the potential client's objectives and explain options

Area	Description
Requirement	<ul style="list-style-type: none"> Understand the potential client's objectives and concerns about the conduct of the Matter, explain options for achieving those objectives and the possible outcomes for each
Tasks	<ul style="list-style-type: none"> Understand and document what the client wants to achieve from the Matter Consider non-legal objectives Identify and explain options for achieving objectives
Guidance	<ul style="list-style-type: none"> Resist a rush to the narrowly define the client's legal objective and the appropriate remedy. Ask open ended questions that provide a wider context to client needs Explain any trade-offs between the client's objectives Ask client to prioritise competing objectives and analyse options in light of these priorities
Controls	<ul style="list-style-type: none"> Knowledge: <ul style="list-style-type: none"> Training/mentoring on understanding client's wider objectives Standard instruction form including prompts for client objectives and concerns Engagement Agreement Template including confirmation of client objectives ❤️ ** Role Clarity: A senior lawyer is accountable to ensure there is a full understanding of the client's objectives and preferred option Motivation: No specific requirement Assurance: A senior lawyer should supervise or review the legal practice's understanding of the client's objectives and preferred option
What could go wrong	<ul style="list-style-type: none"> The client believes the legal practice failed to meet their objectives or failed to meet their most important objectives The client believes they were not presented with all viable options to achieve their objective

Scope services and fees

Area	Description
Requirement	<ul style="list-style-type: none"> Consider the work required by the scope and the fees to be charged for that work (including disbursements and third party fees)
Tasks	<ul style="list-style-type: none"> Consider complexity of Matter and requirements for legal research, supervision and review, fact checking and searches, and 3rd party experts including barristers Document the scope
Guidance	<ul style="list-style-type: none"> Ensure the lawyer scoping the services and fees has sufficient knowledge of the legal issues to scope accurately Review actual scope and fees to previous Matters of a similar nature complexity and potential duration to guide scope and fee estimates Ensure appropriate caveats in scope document and that risks associated with scope and fee are communicated to the client
Controls	<ul style="list-style-type: none"> Knowledge: <ul style="list-style-type: none"> Scoping templates for Matters often managed by the legal practice Engagement Agreement Template including standard services and fee section, to be adapted to particular instructions ❤️ ** Role Clarity: A senior lawyer should be accountable for correctly scoping and providing fee estimates Motivation: Ensure that time spent scoping is acknowledged by the legal practice's performance management system Assurance: The senior lawyer should review and sign off on scoping and fee estimates developed by junior lawyers
What could go wrong	<ul style="list-style-type: none"> As a result of insufficient scoping the legal practice Accepts instructions outside its capability, resulting in errors Does not identify all potential legal strategies to achieve client objectives Sets incorrect client expectations around the outcome/chances of success Sets incorrect client expectations around required work, costs and/or expenses


Explain course of action, rights, obligations and proposed costs

Area	Description
Requirement	<ul style="list-style-type: none"> In accepting an instruction, communicate to the potential client the proposed course of action, their rights and obligations, and the proposed costs and satisfy yourself they understand and give their consent, in accordance with the requirements of the relevant legislation
Tasks	<ul style="list-style-type: none"> Document the proposed course of action, the potential client's rights and obligations, and the proposed costs in an engagement agreement that uses language the potential client can understand and is short enough to ensure they will read it Satisfy yourself that the potential client has read the engagement agreement and understands its contents (see Law Society's template Client Engagement Agreement)
Guidance	<ul style="list-style-type: none"> Satisfying yourself may require you ask the potential client if they have questions regarding any aspect of the engagement agreement
Controls	<ul style="list-style-type: none"> Knowledge: Engagement Agreement Template in accordance with the disclosure requirements of the Act ♥ Role Clarity: A senior lawyer should be accountable for ensuring that the requirements of the Act have been met Motivation: No specific requirement Assurance: The senior lawyer should check and sign off on any document prepared by a junior lawyer
What could go wrong	<ul style="list-style-type: none"> To protect its position, the legal practice drafts an engagement agreement that is difficult for an unsophisticated client to understand. As a consequence, the legal practice may be barred from relying upon agreement in an action involving an unsophisticated client.

Obtain consents and make disclosures

Area	Description
Requirement	<ul style="list-style-type: none"> Obtain consent from client and engage with relevant third parties to ensure appropriate disclosures
Tasks	<ul style="list-style-type: none"> Determine, what if, anything, should be disclosed. to whom and why Determine whether the information is confidential to the client Determine capacity of the client to provide informed consent to disclosure Advise the client of the nature and purpose of the required consent to disclosure Obtain clear instructions from the client consenting to the disclosure If the client does not consent to the disclosure, determine whether it is permitted or required by law Make the disclosure in writing
Guidance	<ul style="list-style-type: none"> The general duty is to keep the affairs and the client confidential unless the client consents to disclosure or is permitted or required by law General areas where disclosure might be permitted or required by law include fraud, money laundering, self-harm, vulnerable children or preventing the commission on a crime The third parties to whom disclosure might be made include a family member, the client's doctor, social worker, police or other public authority Consider disclosure in the context of conflicts, such as where the legal practice acts for several clients whose interests might be adverse and where information confidential to one client is important to another
Controls	<ul style="list-style-type: none"> Knowledge: <ul style="list-style-type: none"> Disclosures and consents checklist Data security and permissions controls Role Clarity: A senior lawyer or principal should be accountable for determining whether to and the making of any disclosure Motivation: No specific requirement Assurance: The need for, consent to, and wording of a disclosure should be checked and approved by a principal
What could go wrong	<ul style="list-style-type: none"> Disclosure of confidential information without consent or other permission Inadvertent disclosure due to lack of system security and data integrity

Complete engagement agreement

Area	Description
Requirement	<ul style="list-style-type: none"> Not act until an engagement agreement that meets the requirements of the relevant legislation has been signed
Tasks	<ul style="list-style-type: none"> Identify urgent deadlines Communicate to the potential client that the legal practice is unable to act until a signed copy of the engagement agreement has been returned Provide the potential client with a completed engagement agreement and clear instructions on how to sign and return Do not act until the engagement agreement has been signed (see Law Society's template Client Engagement Agreement)
Guidance	<ul style="list-style-type: none"> A short engagement agreement using language the client understands assists a quick signing Where immediate action or advice is required, e.g. lodging an injunction, have the client sign an engagement agreement for that work only, then scope and draft a 2nd engagement agreement to manage the rest of the Matter
Controls	<ul style="list-style-type: none"> Knowledge: <ul style="list-style-type: none"> Engagement Agreement Template  Policy to not act until engagement agreement has been signed Role Clarity: A senior lawyer is responsible to ensure both that work is not commenced without a signed engagement agreement and that this does not prejudice the client Motivation: No specific requirement Assurance: Requirement that a copy of the signed engagement agreement is on the file
What could go wrong	<ul style="list-style-type: none"> A client lawyer relationship is established without agreement as to scope or terms

Confirm engagement as required

Area	Description
Requirement	<ul style="list-style-type: none"> Communicate as required with third parties in writing that the legal practice now acts on behalf of the client
Tasks	<ul style="list-style-type: none"> Identify stakeholders to whom such a disclosure should be made and the reasons for it Obtain client's consent to communicating with third parties and disclosing the legal practice is acting for the client
Guidance	<ul style="list-style-type: none"> It is important that third parties connected with the Matter are informed that the legal practice acts for the client so that relevant communications, information are directed to the client through the legal practice. This aids in dealing with the Matter and directs requests, demands and allegations through the legal practice for appropriate action. Third parties might include the other party's lawyer, police, medical providers, family members, government agencies, courts The fact that the legal practice acts for the client might of itself be an unauthorised disclosure of confidential information without first obtaining the client's consent
Controls	<ul style="list-style-type: none"> Knowledge: Checklist of third parties involved in Matters conducted by the legal practice Role Clarity: A senior lawyer is accountable for ensuring appropriate communications and notifications are made Motivation: No specific requirement Assurance: The senior lawyer should check client consent and approve communications with third parties
What could go wrong	<ul style="list-style-type: none"> Communication to third parties without client consent breaches confidentiality



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