Is Going Beyond the Scope of a Fee Agreement Malpractice?

OK, so if a client hires you to do his employment dispute, you sign a fee agreement for such and explicitly lays out that is all you are doing for him. But then he verbally asks you to do his will for example, and you do that without getting him to sign a further agreement, and you bill him for that time, have you committed malpractice? I wouldn't think it would be malpractice - and you have at least a quantum meruit claim to your fees for such. Actually, you have an oral contract to do so. In discussing this issue with another attorney friend, he thought it was malpractice though to do that. Assuming you don't mess up the will of course, I disagreed with him.

Thoughts?

What is the perceived basis for malpractice? That you performed work without a written fee agreement, or that there was some sort of conflict between the employment dispute and the will? So long as the legal work was done competently and without conflict, I don't see a basis for a malpractice claim. The work done in connection with the will isn't covered by the language in your fee agreement, but that seems to be a separate contractual issue unrelated to the quality of the legal work done.

Andrew C. McDannold, Florida

I have the following line in my engagement letters: "If the scope of our engagement expands by our mutual agreement, this letter will apply."

Walter D. James III, Texas

I like that line!! I may start putting it in my agreements.

Sterling L. DeRamus, Alabama

Walter James, thanks for providing the specific sentence about ancillary work.

Roberta Fay, California

Why the heck would it be "malpractice"?

It might be bad business, bad client relations, but it's not malpractice.

Malpractice is Negligence; it's "professonal negligence" but it's Negligence and analyzed like any other negligence claim.

First, did lawyer owe a duty to client to act as a reasonable lawyer would have? Yes.

Second, did lawyer fail to observe that duty? Either do something that he shouldn't have or not do something that he should have? Uh, I'm not seeing that, at least assuming that the will was competently drawn up. The lawyer is not under any obligation to draw up a will, but if he does draw up a will then he needs to do so competently. But going beyond a written fee agreement is not going to be failure to act reasonably, so long as what went beyond the fee agreement was done competently.

Third, EVEN IF lawyer failed in some duty to client, Client still needs to suffer damages. Precisely what damages would client have suffered in this scenario.

Ronald Jones, Florida

I use language similar to Walter's:

"You can limit or expand the scope of the Firm's representation from time to time subject to our agreement, but there should be a clear mutual understanding as to any substantial expansion. Unless otherwise agreed in writing, the terms of this Agreement will also apply to any additional matters we agree to handle on your behalf."

Robert Freund, California

I should've pointed out that the attorney was a big law firm attorney. He was really adamant about it. I agree with the responses. It's not unless you commit malpractice in doing something beyond the scope of the agreement - even if the scope is limited.

Is it possible something a malpractice carrier would say to attorneys? Don't exceed the scope or we won't cover this. Maybe?

Sterling L. DeRamus

Ask him for a case or ethics opinion supporting the idea that billing for agreed-upon, competently performed work is malpractice. Big firm attorneys are allowed to be wrong too!

Robert Freund

This smells like a culture issue to me. In other words, the culture at Big Law is to think small, not exceed the bounds of your specific task box, etc. If in doubt, say no, and pass the buck to someone else. Big Law may have indeed used "malpractice" to scare this lawyer. Any big institution (not just

law) needs some way of managing the large population of workers it employs. Most lawyers will have a gut reflex aversion for anything with "malpractice" associated with it so I can imagine the term malpractice being used as a management tactic to keep lawyers in line.

On the other hand, as a solo or small firm lawyer, you have to be scrappy and think big so you might actually think 'Wait, if the will is done correctly and competently, how is it malpractice? It's a practice management issue, isn't it? I shouldn't work on tasks until the client signs a written agreement on it.'

Andy Chen, California

It doesn't even make sense for BigLaw though. Let's say you have a client your firm is handling a huge case for. Someone in the client's GC office calls and wants a research memo on an unrelated but time-sensitive issue.

The big firm isn't going to send out a new engagement letter for a research memo - they will do the work and send the bill. Imagine the headache it would cause if that were malpractice.

Robert Freund

I think he needs to read the definition of malpractice. It was a risky practice from a contractual standpoint, in that the client could have claimed you didn't have a right to get paid and you could be seen to have lost the protections of your retainer agreement. However, competent work without conflict isn't malpractice. I agree with the others.

I remember my days at large firms and there is a tendency to live and work in a bit of a bubble. I think that may be what was going on there.

Deena Buchanan, New Mexico

Granted not the question asked about wills, but what if the second matter is something that ethics rules require to have a written engagement letter? Then it might be at least an ethical violation.

Shell Bleiweiss, Illinois

The existence of an employment agreement may be a best practice, but it is not a legal requirement to my view. If a written employment agreement is not required to begin with (albeit a good idea) how could a scope of agreement issue become malpractice?

As others have said, malpractice is doing something wrong. Professional negligence is miles away from a scope discussion on an employment agreement.

With or without an agreement, if you screw up on the will that would be malpractice, but the existence or nonexistence of an employment agreement has no bearing.

Darrell G. Stewart, Texas

In CA, we have ethics rules and business and professionals code sections discussing what must be in writing re: fee agreements. This isn't generally a standalone malpractice issue, but one thrown in when suing for problems like not working diligently, overbilling, etc. Would my State Bar consider it malpractice in and of itself? Probably.

Corrine Bielejeski, California

In fact, the CA state bar does not evaluate "malpractice" per se but rather the CA state bar evaluates ethics rules and B&P codes (in the CA statutes) in terms of "disciplining" CA attorneys pursuant to an ethics complaint filed by a client or another suitable party (like a judge or another attorney). Supposedly, malpractice is completely separate (but the legal claims surrounding malpractice may include facts and allegations about ethics rules violations). The standard for malpractice is different than the standard applied for ethics rules violations and B&P code violations ---- so I have been told in various mcle presentations.

Roberta Fay --- still interested in future conflict waiver language

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My representation agreement has language similar to Walter's. My Representation Agreement includes a Client Authorization page which restates the key terms (client name, project description, scope of work) and the client fills in their address, email address, how they prefer to receive documents, etc., and this page is signed, dated and returned to me. The Client Authorization page states "This Authorization also applies to any other legal services requested by Client after the date of this Authorization."

As to malpractice - I don't see how going beyond the scope of a representation agreement in terms of services performed constitutes malpractice. It might be breach of contract, I guess, although it's hard for me to imagine deciding on your own to represent a client in a matter without the client's own participation. But as you and others have said, if the work is done competently and meets the attorney's ethical obligations, doing work that is outside the representation agreement wouldn't be malpractice, in my opinion.

Caroline A. Edwards, Pennsylvania

The idea that exceeding the scope of a written representation agreement, by itself, is malpractice, seems silly. Malpractice is a tort; it requires a duty, a breach of that duty, and damages proximately caused by that breach. Whether an action constitutes malpractice or not, the question of whether it

was within the scope of the written agreement is irrelevant. It is possible, I suppose, that an E&O carrier might require that any work done be within the scope of an engagement agreement for coverage to apply, but I don't think I've ever seen an E&O policy that restrictive.

Kevin Grierson, Virginia