Limitation of Liability

A GUIDANCE NOTE FROM LOCKTON

This note is intended to provide guidance on limiting your liability to clients - it is not intended to constitute legal or professional advice and the information contained is not an exhaustive list of points that you should consider nor are the suggested clauses intended to be used without exercising your own skill and judgment.

Limitation of Liability – Getting it Right

Law firms, like other providers of goods or services, are entitled to limit their potential liability to client by using exclusion clauses in their engagement letters including a cap on financial liability. Any such clause must however be secondary to any restraints imposed by professional conduct rules, and there will always be some uncertainty as to the effectiveness of a clause.

1. CLIENT AWARENESS
   Have you discussed the clause with your client, and have they agreed to it? Simply including it in your Terms of Business is unlikely to satisfy this point - the clause should at least be drawn to their attention in the retainer letter. Ideally it should be discussed in person and the client's specific agreement obtained.

2. PROPORTIONALITY
   If you are attempting to impose a financial cap, is it realistic in relation to the subject matter of the transaction? An unrealistically low limitation may be open to challenge. You and your client need to consider the value of the matter and the potential loss (not necessarily the same thing).

> *In Ampleforth Abbey Trustees v Turner Townsend [2012 EWHC 2137], a case involving a project management company, the Court of Appeal found that a limit equivalent to the total fee paid of £111,000 was inconsistent with another clause which required the defendants to maintain indemnity cover of £10 million. While the 'cap' does not need to match your indemnity cover it should be proportionate to it.*

3. FAIRNESS
   Is your client able to assess whether or not the clause is fair? Could you be seen to have been in an unfair bargaining position? If you are dealing with a large corporate client then this is less likely to be a concern, but if you are imposing a liability cap on a less sophisticated client be aware of the risk that the clause could be challenged on this basis.

4. EFFECTIVENESS
   Will the clause operate to have the effect that you are seeking? If your retainer is vague, uncertain or has not been reviewed then the limitation clause may simply be ineffective. Many indemnity claims arise from work which has been taken on outside the initial retainer and not recorded. Make sure that your retainer is sufficiently detailed to cover all the work that you are doing for the client, and update it if necessary.

Remember that your overriding duty is to follow the principles governing professional conduct - in particular you must act with integrity and act in the best interests of your client. In any circumstance where you are attempting to limit your liability in the event of negligence there is a potential conflict of interest and you must be alert to this.

You cannot exclude liability for death or personal injury and you cannot exclude liability for negligence, you can only aim to limit the extent of any claim.

Limiting your retainer

The key document in any client matter is the retainer. Some key points:

- Identify the client. This may sound obvious, but confusion often arises over who is instructing the law firm where multiple or corporate clients are involved
- Identify the matter – this is particularly important where you receive repeat instructions for similar business from one client
- State clearly the work that is to be done, including any follow-up or ancillary work. If in doubt, ask yourself the question 'when will this matter be finished?' and list all the points that would need to be concluded in order for the file to be closed.
- Set out any areas of work that you will **NOT** be doing. For example if the client has asked you about another matter which you are not able to deal with, make it clear that you will not be covering this
- Confirm any areas where the client has been advised to seek independent advice. It is implicit in some areas of law that you will give advice on taxation but avoid being drawn into this by default. If you have advised the client to speak to an accountant or taxation specialist then set this out clearly.
- Identify any key dates or time limits (and make sure they are entered into your diary)
- Clarify anything which you need the client to do before you can progress further with the matter.
- Finally, make sure the retainer is reviewed regularly - at key points during the life of the matter and at preplanned file reviews. If new work is added or if any of the above points change, ensure that this is recorded on the file and that any key information is updated.

Finally, here are a few suggestions for clauses that you could use in your retainer or terms of business to cover some of the situations outlined above. These are for guidance only and you should exercise your own skill and judgment in drafting any clause attempting to limit your liability to clients or to third parties.

Be aware that the validity of any such clause cannot be guaranteed – there is no substitute for exercising good care and skill in legal practice and operating sound risk management procedures to reduce the risk of any claim.

A. LIMITATION OF LIABILITY

… without prejudice to any other limits or exclusions of liability, our liability to you shall not exceed the maximum aggregate sum of [£XX,000,000] for any claim or claims arising out of

(i) the same act or omission;
(ii) one series of related acts or omissions;
(iii) the same act or omission in a series of related matters or transactions;
(iv) similar acts or omissions in a series of related matters or transactions

B. LIMITATION TO A SINGLE CLAIM

For the purposes of this clause, a claim against any one or more of our partners, assistant solicitors, employed barristers and any other members of our staff (whether employees or not) shall be regarded as a single claim against us and our liability to you shall be limited accordingly.

C. EXCLUDING PERSONAL LIABILITY

Your retainer is with XYZ Limited. This is a limited company and is liable for the services and advice provided by directors, members, partners, consultants and employees of the company and also of any service companies. Directors, members, partners, consultants and employees of [XYZ Ltd and any service companies] are not personally liable for the services and advice they provide to you. You agree not to hold personally liable any directors, members, partners, consultants and employees of XYZ Limited, and our associated businesses named above, save where by law such liability cannot be excluded.

D. LIMITING DUTIES TO THIRD PARTIES

Our duty of care under this contract and any duty of care we may also owe as a matter of law is a duty owed to you alone. We do not owe a duty of care to any third party and assume no responsibility to any third party in respect of the performance of our duties to you.

E. EXCLUDING CLAIMS FOR REGULATORY COMPLIANCE

We exclude any liability of whatever nature arising as a direct or indirect consequence of our compliance in good faith with money laundering provisions or any other statutory, professional or regulatory obligation (and, for the avoidance of doubt, this includes liability for delays caused by our having to seek consent from the relevant authorities including pursuant to the said money laundering provisions).

F. LIMITING LIABILITY TO MATTERS WITHIN THE RETAINER

We shall not be responsible for any failure to provide services on any issue which falls outside the scope of our engagement, and shall have no responsibility to notify you of, or the consequence of, any event or change in the law which occurs after the date on which the relevant service has been provided.