

TAB 7

Limited Scope Retainers

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The Law Society of
Upper Canada | Barreau
du Haut-Canada

CONTINUING LEGAL EDUCATION

Limited Scope Retainers

Gregory W. Cooper*

Introduction

In response to the high costs of matrimonial litigation, various Provinces and States across Canada and the U.S. have started to encourage lawyers to provide what has become known as “unbundled” legal services, “discrete task services” or “limited scope retainers” (herein “LSRs”). While the concept of a limited retainer is nothing new, the professional regulation of such retainers is a recent phenomenon in such places as British Columbia, Alberta and California, prompted in large part by the need to address the issue of access to justice for the low or mid-level income earner.

What is an LSR?

“Unbundling” or LSRs refers to the situation where a lawyer provides limited legal services to a client with respect to specific tasks within the broader scope of their legal dispute or litigation. Counsel may be retained to provide advice for one meeting only, with respect to a single issue in the litigation or something more. LSRs may be entered into for the purpose of coaching a litigant for a specific upcoming event, aiding in the negotiation of contracts, researching a legal point, drafting documents, appearing in court, etc.

Why LSRs?

There are a number of reasons why clients will be interested in retaining counsel by way of an LSR. Primarily, retaining counsel for the entirety of a legal dispute is cost-prohibitive to a vast percentage of the population. However, some people who elect the LSR route may be in a position to afford full legal representation, but may wish to retain

* The author is indebted to Amy Dixon of Cooper, Kleinman, for her able assistance in the preparation of this paper.

ultimate control over their litigation. For these individuals, LSRs are a way to achieve a desired balance between full and no legal representation.

Another appeal of LSRs is that it provides a person with the ability to retain a family lawyer with expertise in one area of matrimonial law and another family lawyer with expertise in a different area of matrimonial law, thereby creating the opportunity for the client to receive the best possible advice with respect to all aspects of the case.

Finally, there is the role that the information age plays in the growing shift toward LSRs. In brief, individuals have greater access to a huge amount of legal information via the internet. Due to the expansive knowledge the general public is able to obtain with respect to family law, the average litigant is capable of learning most of what he or she needs to know about his or her case without the assistance of a lawyer. In the mind of the individual living in the information age, the necessity of retaining legal counsel has diminished and this modern individual may wish to seek very minimal or specific assistance from counsel with respect to their family law matter.

LSRs and Ontario

At present, many family law practitioners agree to represent clients on an LSR basis and it appears to be a growing phenomenon. At this time, however, there are very few rules that govern professional responsibility or the courts with respect to LSRs. Rule 2.04 (15) to (19) of the *Rules of Professional Conduct*, attached to this paper, addresses the professional and ethical rules that specifically relate to the short-term limited legal services a lawyer may provide to a *pro bono* client, a topic beyond the purview of this paper. There is no rule covering an LSR where the lawyer is being compensated for his or her services.

With respect to setting out rules for governing professional responsibility and rules of the court regarding all other forms of LSRs, Ontario is trailing behind other Canadian Provinces such as British Columbia and Alberta. Due to the rise in the use of

these limited or “unbundled” legal services, it is important that Ontario consider some of the ethical and professional responsibility impacts of LSRs.

Some Issues

Problems can arise from the lack of clarity regarding the functioning of LSRs.
For Example:

1. If a lawyer is retained only to advise regarding a specific aspect of a case (say, custody), what is his or her obligation to advise/alert the client about some other aspect of the case (say, child support)?
2. Does the lawyer go on the record or not? If he or she does go on the record, how and when does he or she then go off the record?
3. If the lawyer is retained to deal with a single event (say a motion), what happens if the presiding judge urges the parties to try to settle? To what extent, if any, is the lawyer obliged to participate in/advise regarding settlement discussions?
4. How does the lawyer on the other side know who to communicate with after the event? (The writer was recently arbitrating a matter in which the wife sometimes represented herself, sometimes was represented by counsel and on one occasion was represented by her layman husband. The lawyer for the husband was never sure who he should be speaking to. He eventually solved the problem by sending letters, serving documents, etc. to all three.)
5. What is the obligation to the court of a lawyer on an LSR? What is his or her obligation to opposing counsel?
6. If there is an appeal, who gets served?

7. If the lawyer is retained only to deal with one issue, what happens at, say, a case conference when that is only one of several live issues? Does the lawyer keep exiting and re-entering the chambers as the discussion proceeds? Does the judge need a reporter for the parts of the discussion that don't involve the issue regarding which the lawyer is retained, but not when that issue is being discussed?

8. What sort of written retainer agreement is appropriate in a limited scope retainer situation?

This list is far from exhaustive, and the answers to these (and many other) questions are not obvious. However, some thought has been given to trying to bring some order to the issues in other jurisdictions.

Professional Responsibility and Ethical Considerations for the LSR

This section could not have been completed without the generous assistance of Doug Munro, legal counsel to the Law Society of British Columbia. While the following section raises the precise concerns Ontario counsel must be cognizant of with respect to LSRs, it must be noted that the following recommendations are those of Mr. Munro and they address the concerns that he identified in his report to the Law Society of British Columbia on Limited Retainers.^[1] Mr. Munro advises that a large number of these recommendations have now been incorporated into the British Columbia *Professional Conduct Handbook*. It is suggested that the Law Society of Upper Canada should consider implementing rules regarding the following recommendations into the *Rules of Professional Conduct*.

General Professional Conduct

^[1] "Report of the Unbundling of Legal Services Task Force: Limited Retainers, Professionalism and Practice" by Doug Munro, Policy and Legal Services Department, April 4, 2008. A copy of the Executive Summary is attached.

Recommendation 1:

Because limited scope legal services can enhance access to justice for people who will not retain a lawyer for full service representation, rules that govern professional conduct, and procedure before the courts, should be amended as required to facilitate the proper, ethical provision of limited scope legal services.

Recommendation 2:

Amendments to the [*Rules of Professional Conduct*] providing guidelines for limited scope legal services should not, as a general rule, create a lesser standard of professional responsibility than is otherwise expected of a lawyer. While the scope of services may be limited, the lawyer should provide those services to the level expected of a competent lawyer in a similar situation, taking into account the factors set out in the [*Rules of Professional Conduct*] for professionalism and ethics.

Recommendation 3:

If the lawyer does not feel the professional services contemplated by the limited retainer can be performed in a competent and ethical manner, the lawyer should decline the retainer.

Confidential Drafting Assistance**Recommendation 4:**

It is not improper for a lawyer to provide confidential drafting assistance to clients. Unless otherwise required by law or a court, the discretion to divulge the identity of the lawyer who provided drafting assistance should lie with the client.

Recommendation 5:

In order to best assist the client and the court, the lawyer who provides drafting assistance should draft the documents using clear, plain language, and ensure that the client understands the meaning and possible consequences of the documents. The lawyer

should also ensure the client understands the limited scope of the retainer, and should confirm this understanding, where reasonably possible, in writing.

Recommendation 6:

The [*Family Law Rules*] should not require a lawyer to appear at court simply because the lawyer drafted or assisted in drafting documents (ultimately) filed in court.

Recommendation 7:

A lawyer who provides drafting assistance to an otherwise self-represented litigant should be allowed to rely on that litigant's representation of the facts, unless the lawyer has reason to believe the representations are false or materially insufficient.

Communications

General

Recommendation 8:

[Not applicable]

With Limited Scope Parties

Recommendation 9:

A lawyer may communicate directly with a client who has retained another lawyer to provide limited scope legal services, except if all three of the following factors exist:

1. The lawyer has been notified of the limited scope lawyer's involvement;
2. The communication concerns an issue within the scope of the limited scope lawyer's involvement; and
3. The limited scope lawyer or his or her client has asked the lawyer to communicate with the limited scope lawyer about the issue in question.

With the Courts or Other Litigation Parties

Recommendation 10:

For consistency and certainty, courts should be asked to draft orders in circumstances the court deems appropriate.

Recommendation 11:

In order to facilitate the delivery of limited scope legal services, new court rules and court forms, drafted in plain and concise language, are required to allow a lawyer providing limited scope legal services to go on and off the record in an expedited manner, thereby communicating the scope of that lawyer's involvement to the court, the court registry and interested parties.

Recommendation 12:

The rules regarding service and delivery of documents should be amended to make it clear when service or delivery on a lawyer who is providing limited scope legal services is permissible.

With the Client

Recommendation 13:

A lawyer who provides limited scope legal services should inform the client about the scope of services and the limits and risks associated with the limited services provided.^[2]

Conflicts of Interest

Recommendation 14:

^[2] Attached to this paper is a sample limited scope retainer agreement, based upon precedents found at www.unbundledlaw.org

Save as described in [Rule 2.04 (15) to (19) of the *Rules of Professional Conduct* in Ontario], the regular rules governing conflicts of interest should apply to limited scope legal service retainers.

Recommendation 15:

Not applicable to Ontario.

Education and Transition

Recommendation 16:

In light of the rise in self-represented litigants before the court, court rules should be written in plain language and should strive for consistency between the various levels of court. The various rules of court should create definitions that make it clear which provisions apply to limited retainer lawyers, full service lawyers, and lawyers of record. Nomenclature should be consistent at all levels of court, and if distinctions are to be made between “lawyer”, “solicitor”, “counsel”, and those “of record”, these distinct usages should be defined.

Recommendation 17:

In order to facilitate the delivery and use of limited scope legal services, plain language educational material regarding limited scope legal services, self-representation, and partial representation should be made available to:

- (a) Members off the public;
- (b) Lawyers; and
- (c) Judges and court staff.

Conclusion

In light of the public’s growing interest in unbundled legal services, it is important that the Law Society of Upper Canada, like the Law Societies of other Provinces before

it, start to consider the implementation of Rules, regulations and guidelines for the delivery of legal services through the vehicle of Limited Scope Retainers. It is hoped that this paper may provide a modest incentive toward that end.

Short-term limited legal services

(15) In this subrule and subrules (16) to (19)

“*pro bono* client” means a client to whom a lawyer provides short-term limited legal services;

“short-term limited legal services” means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(16) A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

- (a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario; or
- (b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

(17) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client’s confidential information is made to the lawyer acting for the other clients.

(18) A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of subrule (16) (a) or (b) shall cease to provide short term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in subrule (16) and the lawyer shall not seek the *pro bono* client’s waiver of the conflict.

(19) In providing short-term limited legal services, a lawyer shall

- (a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and
- (b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

Commentary

Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in subrule (15) are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

Subrules (15) to (19) apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by a lawyer representing a *pro bono* client, as defined in subrule (15), will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (17) extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

Rule 2

2.05 Conflicts from Transfer between Law Firms

- identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

Subrule (18) precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

EXECUTIVE SUMMARY

The civil justice reform that is underway in British Columbia and other jurisdictions is spurred, in large part, by the high cost of civil litigation and the delay litigants face in obtaining access to justice. Cost, delay and complexity are often cited as endemic problems in the civil justice system. These problems fuel the rise in self-representation, and the result feeds back into the cause to create a situation Chief Justice McLachlin has described as an “epidemic of lack of representation.”

In response to these concerns, on March 4, 2005 the Unbundling Legal Services Task Force (“Task Force”) was struck. “Unbundling” refers to a situation where a lawyer provides limited scope services to a client, rather than providing full scope legal services. In this Report, we have defined “unbundling” as **“limited scope” legal or litigation services.**

Limited scope litigation services can take many forms, including assisting with the drafting of a document or appearing in court to assist an otherwise self-represented litigant in arguing a particularly nuanced part of a case. From its consultations and research, the Task Force recognized that limited scope legal services are presently being provided in British Columbia. Limited scope legal services have increased over the years, but the rules that govern professional responsibility and the various rules of court have not kept pace with these changes. The challenge is that there are insufficient ethical or procedural guidelines for lawyers providing limited scope legal services, particularly in the litigation context. From both a regulatory and an educational perspective, it is important that guidelines be established to help ensure limited scope legal services are enhancing, and not hindering, access to justice.

Traditionally a client, particularly a litigant, would retain a lawyer for full service representation. This is no longer the case and, increasingly, many litigants are representing themselves before the courts. For some litigants self-representation is a conscious choice. For many, it is a necessity. There are a number of factors that contribute to the rise in the number of self-represented litigants, and the range of causes for the rise in self-representation suggest that there is not a simple solution to the phenomenon.

For those who choose to self-represent, they might be able to afford a lawyer for full service representation, or they might only be able to afford one at a cost that is beyond what they are willing to pay in pursuing or defending a claim. For these individuals, limited scope legal services present a mid-way option between full service representation and no representation. They have enough money to afford some legal assistance, and from a cost/benefit analysis many will see the value in receiving some legal services, whether in the form of drafting assistance, coaching, or a limited appearance.

We must also recognize that part of the rise in self-representation reflects a cultural shift that is taking place in the information age. The Internet and related technologies are transforming the way information is collected, disseminated, and used. Legal information is now easily available to those with access to the Internet. Soon the justice system will be faced with a generation of litigants, the vast majority of whom will be

computer literate and used to collecting and processing information without recourse to an intermediary. It will be a generation that understands information-based services in a very different way than previous generations and has different expectations regarding how those services are to be delivered. Many of these litigants will not see the value in hiring a lawyer to collect and process information they might easily collect themselves. Some will feel they need little or no help from a lawyer when it comes time to advance their case in court. Limited scope legal services provide an opportunity for lawyers to assist this growing demographic in synthesizing information and refining legal arguments. In short, the regulation of limited scope legal services demonstrates the adaptation of the legal profession to an evolving marketplace.

Early in its work the Task Force recognized that solicitors have, for many years, been providing limited scope services without uncertainty regarding how those services might be delivered. Although a limited scope retainer in litigation is different than a limited retainer for solicitors' work, the Task Force believes that solicitors provide an excellent example that limited scope services can be performed ethically and competently. While many of the recommendations in this Report are directed to litigators, the Task Force believes challenges can arise in all areas of practice and that the report has broader application than to barristers alone. The Recommendations are not intended to suggest that solicitors need to modify existing practices that meet the standard of competence and professionalism expected of solicitors and, more generally, of lawyers overall.

This Report describes the environment that has given rise to the need for limited scope legal services, identifies the gaps that exist in ethical and procedural rules, and describes various issues that can arise in the provision of limited scope legal services. The Task Force believes that limited scope legal services can be a valuable tool for enhancing access to justice by allowing people to retain lawyers for discrete services, and in accordance with their means. While limited scope legal services will not stem the rising tide of self-representation before the courts, the Task Force believes that if properly delivered, these services will lead to concrete benefits. First, such services will provide people who cannot afford full service representation with targeted legal assistance that improves their case. Increasing the availability of legal advice and services will enhance access to justice. Second, limited scope legal services can assist the court by better preparing self-represented, or partially represented litigants to advance their case. Third, by presenting only a "full service" or "no service" dichotomy, many lawyers are failing to access and serve a growing market. For some lawyers, the choice not to provide such services stems from uncertainty regarding how limited scope legal services are to be regulated, and whether the courts will respect the limited scope of the retainer, or expect the lawyer to provide services beyond the agreed scope of the retainer.

Where the word "court" has been used in this report, the Task Force intends, where applicable, for the recommendations to apply to matters involving tribunals as well. A lawyer may provide limited scope legal services to a client with regard to a matter before a tribunal, or that is within the jurisdiction of a tribunal to resolve.

The recommendations in this Report are intended to encourage reform that will provide guidelines for the delivery of limited scope legal services, and thereby enhance access to

justice by providing certainty and structure to their provision for clients, lawyers, the courts and the overall community.

LIMITED SCOPE RETAINER AGREEMENT

BETWEEN: Jane Doe
AND: COOPER, KLEINMAN - Barristers
RE: Doe and Doe – Matrimonial Matter

This Limited Scope Retainer Agreement (“Agreement”) is entered into between **JANE DOE** (the “Client”) and **Cooper, Kleinman – Barristers** (the “Lawyer”). They agree as follows:

1. As the Lawyer has explained to the Client, this Agreement is different from the usual Retainer Agreement for several reasons. First, unlike a typical Retainer Agreement, this Agreement is for limited legal service(s), rather than for the complete array of services that lawyers often provide to their clients in the pre-litigation and litigation phases of a lawsuit. Second, in this Agreement, the Client has agreed to do a number of different things, or to arrange for another person to complete these tasks. They are set forth in Para. 9. Third, the total fee will be less than the Lawyer’s normal full-service fee, because the scope of the legal services that the Lawyer has agreed to provide to the Client is limited.
2. The Limited Legal Service(s) that the Lawyer has promised in this Agreement to provide are:
 - ___ Advice re: availability of alternative means to settle dispute
 - ___ Evaluation of client’s self-diagnosis/advice as to legal rights
 - ___ Service Problems: Needs Assistance with Service
 - ___ Review of Correspondence and/or Court Documents; preparation of Correspondence and/or Court Documents
 - ___ Factual Investigation: contacting witnesses, public record searches, interviews of experts, etc.
 - ___ Legal Research and Analysis

- ☐ Negotiation of Domestic Agreement
- ☐ Assistance with or Preparation of documents for Case Conference, Settlement Conference and/or Trial Management Conference
- ☐ Pre-mediation/Pre-settlement Conference Legal Consult
- ☐ Post-mediation Agreement Review
- ☐ Backup and Troubleshooting during Trial
- ☐ Assistance with Discovery or Questioning Issues
- ☐ Appearance at court
- ☐ Full Scale Legal Representation at Emergency Hearing
- ☐ Full Scale Legal Representation throughout Litigation
- ☐ Counseling or procedural assistance with Appeal

Services not listed above will not be provided. If a legal service is not listed in Para. 2, the Lawyer has not agreed to provide it to the Client.

3. This Agreement will take effect upon the execution of it by both parties, i.e., at a time when both parties have signed it.
4. This Agreement will automatically terminate when the Lawyer has provided the services set forth in Para. 2, above, without any further act or communication by either the Lawyer or the Client. If the Lawyer requests the Client to do so, the Client will support, as requested by the Lawyer, the Lawyer's right to stop representing the Client when the Lawyer has met his obligations under Para. 2, above.
5. [INSERT REGULAR FEES AND DISBURSEMENT CLAUSE(S)]
6. To help the Lawyer represent the Client effectively, and to reduce the costs of the representation, the Client agrees:
 - a) At the Lawyer's request, to provide and to help the Lawyer obtain all

information (in whatever form it may appear) that the Client or someone to whom the Client may make an appropriate request possesses;

- b) To make himself or herself available for any meetings, interviews, or other events that the Lawyer requires, including at the Lawyer's office if requested;
- c) To carefully consider the Lawyer's advice before making any major decisions;
- d) To make himself/herself available to provide sworn testimony, e.g., in a questioning, affidavit, trial or other proceedings, when the Lawyer requests this;
- e) To immediately tell the Lawyer if and when the Client moves (changes residences), changes jobs, changes a phone number or other electronic means of communication, or otherwise makes it difficult for the Lawyer to communicate with the Client;
- f) To inform the Lawyer about any new developments or information in the matter, e.g., court notices, letters from the opposing party, new factual developments, or other similar developments;
- g) To respond to the Lawyer's communications (letters, emails, telephone calls, or other forms of communication) as soon as reasonably possible;
- h) To otherwise, as indicated by the Lawyer, help the Lawyer provide the services identified in Para. 2, above, and to effectively represent the Client; and
- i) To perform, or have another person or entity perform, the following additional tasks:

[INSERT OTHER STANDARD RETAINER CLAUSES]

7. **Statement of the Client's Understanding:** I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

 I have accurately described to the Lawyer the nature of my case.

 I will remain in control of my case and assume responsibility for my case.

 The services that I want the Lawyer to perform in my case are identified by check marks in Para. 2, above. I take full responsibility for all other aspects of my case; I accept the limitations on the Lawyer's responsibilities and understand that if I make mistakes in handling my own case, I have granted the Lawyer immunity from being sued for professional malpractice. This means that I cannot sue and/or recover from the Lawyer regardless of the damage I might suffer.

 I acknowledge that I have been advised by the Lawyer that I have the right to consult another independent Lawyer to review this Agreement and to advise me on my rights as the Client before I sign this Agreement.

Dated:

Signed: _____

The Client

Dated:

Signed: _____

The Lawyer