

## *Limited Scope Retainers*

### **Deciding to Offer a Limited Scope Retainer**

There is nothing in Alberta's *Code of Professional Conduct* ("Code") that prohibits limited scope retainers (also known as "unbundled services"), and very little that contemplates these types of arrangements. However, many of the rules in the *Code* can be read as supportive of the provision of unbundled services. These include:

- ✚ "A lawyer...has....a duty to ensure that the public has access to the legal system."<sup>i</sup>
- ✚ "A Lawyer should seek to improve the justice system."<sup>ii</sup>
- ✚ "A lawyer should support and contribute to the profession's efforts to make legal services available to all who require them, regardless of the ability to pay."<sup>iii</sup>
- ✚ Lawyers are responsible "...to ensure that competent and high-quality legal services are readily available at reasonable cost to those who require them."<sup>iv</sup>

The CBA *Code of Professional Conduct* tells us that:

- ✚ The lawyer may also assist in making legal services available by participating in legal aid plans and referral services, by engaging in programs of public information, education or advice concerning legal matters, and by being considerate of those who seek advice but are inexperienced in legal matters or cannot readily explain their problems.<sup>v</sup>

### **Potential Client Base**

There are several types of potential clients of unbundled legal services. First, there are those who cannot afford to hire a lawyer for full-service representation, yet do not wish to fully represent themselves. As Canadians save less and hold more debt, the percentage who has limited resources is growing.<sup>vi</sup> Court processes also take more time and resources than they did in the past.<sup>vii</sup> In addition, there is a strong public perception that legal fees are too expensive, leading to a reluctance to seek legal help even amongst those who may have some assets.<sup>viii</sup>

At the same time, the expansion of internet resources and a new "do-it-yourself" approach amongst many Canadians has led to a desire to shift from the traditional model of lawyers as gatekeepers of legal information. Many people simply want more control over their legal matters, and may resent the traditional model of lawyers as gatekeepers. As a result, another potential source of clients are well educated, sophisticated consumers who wish to handle their legal issues themselves but are willing to pay for some expert guidance on the more complex procedural or legal issues.<sup>ix</sup>



### **Best Practices in Limited Scope Retainers**

It is up to each lawyer to decide, as a matter of professional judgment, whether providing limited scope services is appropriate for a given client. While the actual services provided are more limited, and legal fees lower, the ethical obligations that are owed to limited scope clients are the same as those owed to full service clients. To ensure that you are providing the best possible service to your clients, and avoiding any ethical or legal pitfalls, keep in mind the following considerations.

**Conduct a thorough initial interview.** This is crucial to helping you assess the legal issues in the case, the client's ability to self-represent, and your ability to work together with the client. Take advantage of existing resources to help this process, such as the checklists found at <http://www.texasatj.org/files/file/FLRiskMgmt.pdf>

**Ensure a clear mutual understanding of the scope of work.** Limitations on scope must be informed and in writing. In the retainer agreement, clearly divide the work between that for which you will be responsible, and that for which the client is responsible.<sup>x</sup> In the event of any changes in scope, be sure to discuss these with the client, and obtain their informed, written consent.

If the client has literacy or language issues, special consideration should be given when entering the retainer. As limitations on scope must be informed and in writing, a translator may be required and/or the document may need to be read aloud to the client before they can agree to its terms.

**Stick to areas of the law in which you are knowledgeable.** This is not the time to learn a new area of law, as you will need to be able to predict the issues that may arise as well as the steps that will need to be taken in the matter. A lawyer's duty to provide competence service, as set out in Chapter 2 of the *Code*,<sup>xi</sup> is not relaxed in limited scope retainers. The *Code* notes that:



A lawyer must therefore carefully assess in each case in which a client desires abbreviated or partial services whether, under the circumstances, it is possible to render those services in a competent manner...In circumstances in which abbreviated or partial services may be rendered competently, the client must be fully apprised of the risks and limitations of the retainer. Discussions with the client in this regard must be confirmed in writing.<sup>xii</sup>



**Does the client possess the capacity to self-represent?** If the client has literacy challenges, is not fluent in English, has a mental disability, is unable to emotionally detach from the issues to a reasonable level, or otherwise may have difficulty in handling part of the matter themselves, the case may not be a suitable one for unbundling. Additionally, if the matter is very complex, such as a pensions or tax matter, a limited scope retainer may not be appropriate.

However, before declining a retainer, keep in mind the general principle that some representation is generally better than no representation. Be mindful also of Chapter 1, Rule 4 of the *Code* which states that: "A lawyer should support and contribute to the profession's efforts to make legal services available to all who require them, regardless of the ability to pay." The commentary on this rule admonishes lawyers that they "should be slow to decline to act for a disadvantaged client unless the refusal has substantial ethical justification", such as competence or a conflict of interest. In such cases, the client should be assisted in finding other counsel.

**Does the client have realistic expectations?** Be clear with your client that not only will the fees be limited in a limited scope retainer, but that services will be limited too. Ensure, through a written retainer, that there can be no misunderstanding about what services you have agreed to perform, and what the client will be responsible to do. The client needs to be realistic about what they can achieve on their own, have time to devote to the matter, and be prepared to do the

work that is their responsibility under the terms of the limited retainer. In addition, the client needs to be open to take advice and coaching from you about the legal system and possible outcomes. This is in keeping with the obligation to use reasonable efforts to ensure that the client comprehends your advice and recommendations.<sup>xiii</sup>

If you are concerned that the client won't be receptive to your advice and willing to rein in their expectations, the retainer should be declined.

**Is the client sharing all relevant information?** The requirement to obtain all facts relevant to the client's problem is part of a lawyer's obligation to provide competent services.<sup>xiv</sup> The *Code* is clear that "[e]xcept when the client directs otherwise, a lawyer must ascertain all the facts and law relevant to the lawyer's advice."<sup>xv</sup>

The failure of a client to be forthcoming is a risk even when providing a traditional full service retainer, but arguably is more of a risk in a limited retainer as the contact with the client may be less frequent and the lawyer's independent investigations into the facts less likely. Clearly explain to the client the risks involved if not all information is provided to you, both at the initial interview and on an ongoing basis. In the event the client provides you with incorrect, incomplete or misleading information, the advice you provide may not be useful or correct.

**Do I need to advise on questions or issues not specifically addressed by the client?** If additional problems or issues are identified by the lawyer, even where outside the scope of the retainer, the lawyer should identify those issues to the client. Where there are ambiguities as to the scope of the retainer, these ambiguities will be construed against the lawyer. However, the *Code* cautions that unsolicited advice will not be appropriate if, in the circumstances, the lawyer's intervention could be construed by the client as intrusive.<sup>xvi</sup>



**Do I need to disclose the limited retainer to the Court?** There is no specific requirement in our Rules of Court or in the *Code* for a lawyer who is merely advising a client, or ghostwriting documents, to disclose their role to the Court. There are strong arguments on both sides of the issue and guidance on this issue from the Law Society and the *Code* would be of assistance.<sup>xvii</sup> On the one hand, failure to disclose a lawyer's involvement may violate the lawyer's duty of candour to the courts and the profession. On the other hand, disclosing may violate the *Code*, which requires that a lawyer "must not disclose the identity of a client nor the fact of the lawyer's representation."<sup>xviii</sup> In addition, once a lawyer's name appears on a court document, he or she becomes lawyer of record. In the United States, where this issue has been the subject of much discussion, opinions remain split.

If a lawyer is involved in the preparation of court documents but does not file them him/herself, be cautious that the client could alter the documents in such a way that they become frivolous or misleading. Document your file carefully to protect yourself in such cases.

When appearing in court on a limited retainer, a lawyer must make this clear to the court.

Section 2.27 of the new *Alberta Rules of Court* states that if a lawyer is retained to appear before the court for a limited purpose, he or she must inform the Court of the nature of the appearance, either orally or, prior to the appearance, by filing the terms of the retainer. In such a case, he or she would be functioning only as a limited lawyer, and not as "Lawyer of Record".

**Avoid Conflicts of Interest.** The rules regarding conflicts are the same for limited scope retainers and full service representation. The exception to this is the provision of short-term legal services through a non-profit legal services provider, in which case Chapter 6, Rule 5.1 of the *Code* will apply.

**How should communications with the other side be handled when a limited scope retainer is involved?** The *Code* states that if a lawyer is aware that a party is represented by counsel in a particular matter, the lawyer must not communicate directly with that party on the matter, except with the consent of the party's counsel.<sup>xix</sup> This rule does not contemplate limited scope situations, and consequently guidance from the Law Society and the *Code* on this issue would be of assistance.

A common sense approach may be to permit lawyers to communicate directly with a party who has retained a lawyer for limited scope services, except in such cases as the lawyer has been notified of the limited scope retainer and the communication concerns an issue within the scope of the limited lawyer's involvement. Where the lawyer knows only of the limited scope retainer but not the scope of the limited lawyer's involvement, it would be appropriate to direct communication to both the limited lawyer and the party unless directed by the limited lawyer to do otherwise. The onus lies with the limited lawyer, with their client's consent, to notify opposing counsel as to the existence and scope of their representation. Δ

Authors: Angela Croteau, Legal Counsel, [Angela.croteau@gov.ab.ca](mailto:Angela.croteau@gov.ab.ca)  
Jeanette Fedorak, Executive Director - Strategic Policy, [Jeanette.fedorak@gov.ab.ca](mailto:Jeanette.fedorak@gov.ab.ca)

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i *Code*, Ch. 1, Statement of Principle

ii *Code*, Chapter 1, Rule 2

iii *Code*, Chapter 1, Rule 4

iv *Code*, Chapter 2, Comment G.1

v Chapter XIV, comment 5

<sup>vi</sup> Vanier Institute of the Family, *The Current State of Canadian Family Finances - 2009 Report* by Roger Sauvé, release February 16, 2010 (<http://www.vifamily.ca/library/cft/famfin09.pdf>)

<sup>vii</sup> Law Society of British Columbia, *Report on the Unbundling of Legal Services Task Force*, April 4, 2008 ([http://www.lawsociety.bc.ca/publications\\_forms/report-committees/docs/LimitedRetainers\\_2008.pdf](http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/LimitedRetainers_2008.pdf))

<sup>viii</sup> *Listening to Ontarians: Report of the Ontario Civil Needs Project*. Law Society of Upper Canada, May 2010 ([http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)). See also May 2010 Ipsos Reid survey for the Law Society of Alberta, at [http://www.lawsocietyalberta.com/files/whatsnew/Ipsos\\_Reid\\_Table\\_18May2010.pdf](http://www.lawsocietyalberta.com/files/whatsnew/Ipsos_Reid_Table_18May2010.pdf)

<sup>ix</sup> *Listening to Ontarians: Report of the Ontario Civil Needs Project*. Law Society of Upper Canada, May 2010 ([http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf))

<sup>x</sup> Sample retainer agreements can be found at <http://www.texasatj.org/files/file/FLRiskMgmt.pdf> and <http://www.abanet.org/legal/services/delivery/delunbund.html>

<sup>xi</sup> See also *Code*, Chapter 9, Rule 4.

xii Chapter 2, Commentary G.1(c)(v)

xiii *Code*, Chapter 9, Rule 12.

xiv *Code*, Chapter 2, Comment G.3(a)

xv *Code*, Chapter 9, Rule 2.

xvi *Code*, Chapter 9, Comment G.3

xvii The Law Society of British Columbia's *Report on the Unbundling of Legal Services Task Force*, April 4, 2008 ([http://www.lawsociety.bc.ca/publications\\_forms/report-committees/docs/LimitedRetainers\\_2008.pdf](http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/LimitedRetainers_2008.pdf)) recommended that confidential drafting assistance of court documents be permitted and that the disclosure to divulge the lawyer's involvement be left with the client.

xviii *Code*, Chapter 7, Rule 2. Disclosure can be made, however, when expressly or impliedly authorized by the client (*Code*, Chapter 7, Rule 8(e))

xix *Code*, Chapter 4, Rule 6.