

LAWPRO's Submissions on Unbundled Legal Services

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LAWPRO Background

LAWPRO is a wholly Canadian owned insurance company. LAWPRO 's mission is to be an innovative provider of insurance products and services that enhance the viability and competitive position of the legal profession. Incorporated in 1990 by The Law Society of Upper Canada, LAWPRO has operated independently of the Law Society since 1995, with its own management and Board of Directors. LAWPRO provides the 22,000 lawyers in private practice in Ontario with cost-effective liability insurance, expert claims administration, and proactive risk and practice management initiatives to help prevent claims. Through its practicePRO initiative, LAWPRO educates lawyers on where and why malpractice claims occur, and it provides them with tools and resources showing them the proactive steps they can take to reduce their claims exposure. Through its TitlePLUS operation, LAWPRO provides comprehensive title insurance and legal services coverage for residential purchase and mortgage-only/refinance transactions handled by lawyers across Canada.

LAWPRO's Submissions on Unbundled Legal Services¹

Preface

Lawyers' Professional Indemnity Company (LAWPRO) welcomes the opportunity to make submissions with respect to efforts to make the provision of unbundled legal services more widespread in Ontario and on the proposed amendments to professional conduct rules provided to Convocation in the **“Unbundling” of Legal Services and Limited Legal Representation Background Information** report.

Executive Summary

LAWPRO is concerned that the more widespread provision of “unbundled” legal services in Ontario will increase malpractice claims. The source of this concern is that the root causes of the most common malpractice errors that LAWPRO sees are at least equally, if not more likely, to occur during the provision of unbundled legal services. It should also be recognized that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems.

LAWPRO's position is that all the rules that apply to full representation should also apply to unbundling or limited scope representation. Limited scope representation should not mean less competent or lower quality legal services. Lawyers providing unbundled legal services owe the same duties of competence, diligence, loyalty and confidentiality to limited-scope clients that they owe to full-service clients. It is critical that lawyers identify the discrete collection of tasks they can undertake on a competent basis when handling an unbundled matter, and it is clear to the lawyer and the client what tasks the lawyer is responsible for, and those for which the lawyer is not responsible. Ideally this should be done in a written retainer as post-matter disputes over the scope of work to be done are far more likely if the retainer is ambiguous and/or not in writing.

If the greater provision of unbundled legal services is to be encouraged and facilitated through changes to the Rules of Professional Conduct, the Rules of Civil Procedure, and other court rules and policies, LAWPRO suggests that the goal of ensuring more satisfied clients and reduced malpractice claims can be attained by highlighting how the basic principles behind the existing ethics and court rules apply equally in the context of unbundled services. Some issues will likely require Rules changes.

¹ Portions of these comments were adapted from **THE ETHICS, BENEFITS AND RISKS OF UNBUNDLED LEGAL SERVICES**, a paper written by James M. McCauley, Ethics Counsel Virginia State Bar Richmond, Virginia for the Fall 2009 Conference of the American Bar Association's Standing Committee on Professional Liability.

What are “unbundled” legal services?

LAWPRO’s impression is that many lawyers are unfamiliar with the “unbundling of legal services” concept and terminology, notwithstanding that some Ontario lawyers are today providing unbundled services to clients in one form or another.

At its very simplest, the “unbundling” of legal services, also commonly called “limited scope representation” or “a limited scope retainer”, is an arrangement whereby a lawyer and a client agree that the lawyer will assist with some, but not all, aspects of the client’s legal matter. Another term sometimes used to describe unbundling – and one that is far more literal and properly descriptive – is “discrete task representation.” When lawyers agree to offer “unbundled legal services” to their clients, they agree to complete specific tasks with respect to a legal matter, leaving the clients to complete the remaining tasks for themselves.

LAWPRO believes that the concept of discrete task representation is critical with respect to how lawyers should govern themselves when handling unbundled matters, and to any amendments to the Rules of Professional Conduct and the Rules of Civil Procedure related to unbundling. Lawyers must be able to identify the discrete tasks they can undertake on a competent basis when handling unbundled matters, and they must understand how ethics and court rules apply to the tasks they handle on those matters.

Practically speaking, LAWPRO would see the provision of unbundled legal services as typically falling into one of three general categories:

- Consultation: Typically a short meeting or phone call with a lawyer to get advice and direction on a legal matter or issue;
- Document preparation: Sometimes referred to as “ghostwriting”, which typically involves a getting a lawyer’s assistance as to form and content of a contract, court pleading or other legal document; and
- Limited representation in court, an administrative hearing, at a mediation, etc.: Typically where a lawyer provides assistance with a single appearance in court or at a hearing, or for work and appearances for a particular stage of a matter.

Comments on the proposed definition of “limited legal services” or “limited legal representation” in Rule 1.03(L)/1.02(P) – Interpretation

It is proposed that a definition of “limited legal services” or “limited legal representation” should be added to the rules. The proposed definition reads as follows:

“limited legal services” or “limited legal representation” means the provision of legal services by a lawyer/paralegal for part, but not all, of a client’s legal matter by agreement between the lawyer/paralegal and the client;

LAWPRO is concerned that the use of the word *limited* in the terms “limited legal services” or “limited legal representation” in this definition might suggest to some lawyers or clients that less than full and competent legal service is acceptable in the unbundled context. As

stated above, LAWPRO believes that the concept of discrete task representation is critical with respect to how lawyers should govern themselves when handling unbundled matters. LAWPRO thus proposes that it would be better to use the term “limited scope retainer” in this definition to make it clearer to both lawyer and client that the lawyer is agreeing to complete specific tasks with respect to a legal matter and will be leaving the client to complete the remaining tasks with assistance. The use of the term *limited scope retainer* will help lawyers be in the frame of mind to be thinking about identifying the discrete tasks they can undertake on a competent basis when handling unbundled matters. On a related point, LAWPRO has a similar concern with the use of these terms and the terminology in the proposed amendments to the Competence and Quality of Legal Service rules and commentaries (See pages 11 and 12).

Unbundling is not new to Ontario

LAWPRO recognizes that the “unbundling” of legal services is not new to Ontario, and indeed, in some forms and to various degrees it currently occurs in some areas of practice. Clients often negotiate their own agreements, but before or during negotiation may ask a lawyer for advice on relevant issues that might arise. Sometimes, a lawyer's only role is to draft a document reflecting an arrangement reached entirely without the lawyer's involvement. Clients involved in administrative hearings (such as zoning or licensing matters or landlord and tenant matters) may ask a lawyer to help them prepare for the hearing, but not to appear at the hearing. Legal clinics, duty counsel and pro bono lawyers also often provide limited scope assistance to clients, as do some of Pro Bono Law Ontario's programs.

It is clear that Ontario lawyers are assisting clients with the preparation of pleadings prior to and even during litigation proceedings. “Collaborative family law” is also a type of unbundled legal service as the lawyers and clients enter a four-way agreement beforehand that if the parties cannot reach agreement, the lawyers are disqualified from representing their clients thereafter in the same or related matters.

In the corporate environment, in-house counsel may have different aspects of a major transaction handled by different lawyers or law firms, in particular where specialized advice is required, such as real estate, corporate finance, tax or competition law. In some cases sophisticated clients will handle parts of a transaction.

Unbundling is not for everyone

Unbundling is already occurring in Ontario, and is definitely here to stay. However, in LAWPRO's opinion this should not lessen the thought and consideration that should be undertaken before steps are taken to encourage or facilitate the wider use of unbundling.

Unbundling is itself only a limited solution to the complex issue of access to justice. In the majority of situations some legal help is probably better than none. An informed self-represented litigant is likely to be more capable than an uninformed one. A partially-represented litigant is likely more effective than a wholly unrepresented litigant. But,

limited scope legal assistance is not appropriate for all lawyers, all clients, or all legal problems. Limited scope representation is not ideal compared to full service representation and the client's decision to accept limited scope representation is usually driven by financial necessity, not by choice.

In the U.S., where programs to encourage and facilitate unbundling have been widely implemented, the courts in several states will not allow unbundling in certain types of cases. The ultimate decision about whether and how to provide limited scope assistance to a client depends upon the capabilities of the client, the nature and importance of the legal problem, the degree of discretion decision-makers exercise in resolving the problem, the type of dispute resolution mechanism, and the availability (or not) to the client of other self-help resources. In the U.S. the demand for unbundled legal services for family law matters has been very high. All of these factors should be considered in any effort to make unbundled legal services more widely available in Ontario.

The Regulatory environment

The Ontario Rules of Professional Conduct say nothing that would prohibit the unbundling of legal services. Thus, under the current Rules a lawyer and client can limit the scope of representation and agree upon the means used to achieve the client's goals or objectives. However, while the Rules afford the lawyer and client great latitude to limit the time spent or costs of the representation, the limitation must be reasonable under the circumstances. Limitations should not be considered reasonable if the time allotted is not sufficient to yield advice upon which the client can rely.

In a nutshell, LAWPRO's position is that all the Rules that apply to full representation should also apply to unbundling or limited scope representation. Lawyers providing unbundled legal services owe the same duties of loyalty, confidentiality, diligence, and competence to limited-service clients that they owe to full-service clients. As compared to a full scope representation, there may be fewer tasks performed by the lawyer on a limited scope matter, but the quality of the work done on those tasks must not be less than it would be on a full service matter. It is critical that lawyers identify the discrete tasks they can undertake on a competent basis on unbundled matters.

LAWPRO believes three fundamental requirements must be met before a lawyer may properly limit the scope of services to be provided to a client. First, the lawyer must consult with the client about the limited representation that will be provided. Second, the client must provide informed consent, and ideally, this consent should be evidenced by something in writing. Most importantly, the limitation must be reasonable in the circumstances and the engagement must not be so limited as to prevent competent representation. These points, and the basis for them given the claims LAWPRO commonly sees, are discussed in more detail below.

The biggest claims risks

Most lawyers are surprised to learn that failures to know or apply substantive law account for a relatively small portion of LAWPRO claims. Over the last ten years, by both count and cost, law-related errors were only the fourth most common cause of claims (9.6% by count).

The biggest claims risks by count and cost over the last 10 year - over one-third of LAWPRO's claims in most areas of practice – involve basic lawyer/client communication/relationship issues. Inadequate investigation or discovery of facts is the third most common error at 15.3 per cent of LAWPRO's claims over the last 10 years. Together, these two types of errors accounted for almost one-half the claims files that LAWPRO handled in the last ten years. It is LAWPRO's opinion that these two types of errors have an equal, if not greater propensity, to occur when legal services are provided on an unbundled basis.

Communications-related errors are the most common claims risk

Lawyer/client communication-related errors are the biggest cause of malpractice claims. Over the last ten years, by cost and count, more than one-third of LAWPRO claims involved this type of error - over \$230 million on 7269 claims.

It is interesting to note that for sole, small, medium and large firms alike, one third of claims were communications-related. This is a profession-wide issue for all areas of the law.

LAWPRO sees three types of communication-related errors. The most common is a failure to follow the client's instructions. Often these claims arise because the client says one thing about what was said or done, or not said or done, and the lawyer says another. These claims tend to come down to credibility, and in handling claims LAWPRO finds these matters are difficult to successfully defend if the lawyer has not documented the instructions with sufficient notes or other documentation in the file.

The second most common communications error: a failure to obtain the client's consent or to inform the client. These claims involve the lawyer doing work or taking steps on a matter without client consent (e.g., seeking or agreeing to adjournment; making or accepting a settlement offer) or the lawyer failing to advise the client of all the implications or possible outcomes when decisions are made to follow a certain course of action (e.g., the client has problems crossing the U.S./Canada border after pleading guilty on an impaired driving charge; exercising a shotgun clause to acquire a business and having the other side exercise its rights to a buy-out).

Poor communications with a client is the third most common communications error. These claims often involve a failure to explain to the client information about administrative things like the timing of steps on the matter, or fees and disbursements. This type of error also arises when there is confusion over whether the lawyer or client is

responsible for doing something during or after the matter (e.g. sending lease renewal notice to landlord; renewal of a registration or filing).

On top of being the most common malpractice errors, the contradiction and irony is that communications-related claims are also among the easiest to prevent. Post-matter disputes over the scope of work to be done are far less likely if there is a written retainer prepared at the commencement of the matter that is clearly specifies the work to be done. Lawyers can significantly reduce their exposure to this type of claim by controlling client expectations from the very start of the matter, actively communicating with the client at all stages of the matter, creating a paper trail by carefully documenting instructions and advice, and confirming what work was done on a matter at each step along the way.

Where a lawyer is working for a client on a limited scope retainer, the exact scope of the retainer becomes even more important when it comes to the client's expectations as to the work the lawyer is to do and not do on the matter. Further, it is critical that lawyer/client communications are clear and unambiguous at all stages of the matter as there is more opportunity for confusion as to what the lawyer is and is not to work on. When a lawyer is handling only some of the issues on a legal matter, there is more possibility of communication-related errors occurring. LAWPRO sees claims arising from limited scope retainers, usually because the lawyer and client didn't have a clear understanding of what work the lawyer was to do. Therefore, for claims prevention purposes it is essential to emphasize the importance of a clear retainer and good lawyer/client communications in any efforts to increase the availability unbundled legal services in Ontario.

Inadequate investigation or discovery of facts

Inadequate investigation or discovery of facts is the third most common error at firms of all sizes excepting the largest firms² and over the last ten years accounted for 3199 claims (15.3%) and \$105 million (16.2%) of LAWPRO's costs.

This error goes to the very core of what lawyers are supposed to do for their clients – give legal advice tailored to the client's specific circumstances – and basically involves the lawyer not taking a bit of extra time or thought to dig deeper and ask appropriate questions on the matter. This error has been on the rise for the last several years in many areas of law. Perhaps it is a symptom of “BlackBerry legal advice”: quick questions and quick answers exchanged without context between people in a rush.

On a real estate deal this type of claim might involve not delving into the client's long-term plans for the property, and then failing to follow up on appropriate zoning or bylaw searches to ensure the client can use the property as intended (e.g. as an in-law suite or for a particular type of business). On a family law, will or estate planning matter it might involve not digging into more details about the status of past marital relationships, other children or step-children, or the amounts of assets or liabilities. On a merger and

² For firms of more than 75 lawyers it was the fourth most common error, but it was behind the third most common error at large firms (the failure to know or apply law) by only 0.1%. The failure to know or apply law was the fourth most common error at firms of all sizes, excepting the large firms.

acquisition matter this error would arise where shortcuts are taken when completing due diligence work. These are examples from matters that would typically be full-service retainers, but they also serve to make the point that legal matters can often be more complex than they initially appear.

The Rules of Professional Conduct require that a lawyer provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation. Any agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible, but this should not lessen the lawyer's obligations under the Rules to be thorough or prepared, to investigate the facts of a matter and research the applicable law in a competent manner.

A lawyer who is interviewing a client with an eye toward limiting the scope of the representation must interview the prospective client as carefully as that lawyer would a client who can afford full representation. Moreover, limiting the interview of the client simply because other issues are not going to be pursued places the lawyer at risk of failing to advise the client to seek other counsel, or of an impending deadline or statute of limitations issue, which in turn may open the lawyer to a malpractice claim. **One of LAWPRO's biggest concerns is that lawyers who limit the scope of their representation may nonetheless be held accountable for failing to warn the client of material legal issues or claims, even though they were not part of the limited scope representation agreement.** Courts in the U.S. have held lawyers liable for malpractice in this circumstance.

To avoid this type of claim – on both full and limited scope retainers – lawyers need to take the time to “read between the lines” so they can identify and advise the client on all appropriate issues and concerns. Lawyers should ask: What does the client really want? Does everything add up? Are there any issues or concerns that should be highlighted for the client? If something doesn't add up, they should dig deeper. This should be highlighted in any efforts to increase the provision of more unbundled legal services.

Failure to explain the risks and disadvantages of unbundling

An extra obligation imposed on the lawyer providing unbundled legal services to a client is the need to obtain the client's consent to the limited scope of the representation. That consent must be an “informed consent” and should include disclosure by the lawyer of the risks and disadvantages of limiting the scope of the representation. In the Ontario case of *669283 Ontario Ltd. v. Reilly*, the judge summarized the issue when he stated the following: “If I had concluded that... [the] retainer was limited to the extent he [i.e., the lawyer] says it was, I might well have concluded that he was negligent in not satisfying himself that the limitation of his retainer was an informed one made by clients who knew whereof they spoke.”³

³ 1996 CarswellOnt 293, para. 67.

The type and extent of information needed to satisfy that the “consultation” requirement was met will vary with each client and the client's ability to understand. If a client has not regularly used a lawyer, extra care should be taken to ensure that the client truly understands the limits of the representation and consequent risks.

Experience in the U.S. indicates that there will be post-matter disputes as to the scope of the lawyer’s representation on limited scope retainers. Court decisions in the U.S. show that dissatisfied clients will challenge purported limitations by refusing to pay fees, filing malpractice suits or ethics complaints. Commonly made allegations include that the lawyer was not authorized to undertake certain aspects of the representation; that the fees were unreasonable given the nature or scope of a limited representation; that the litigation result or settlement should have been more favourable; or that the lawyer did not handle an aspect of the matter properly.

In the case where something was not done that allegedly should have been done (and the client will frequently judge this with the uncompromising and impossible standard of 20:20 hindsight), clients frequently argue that the lawyer should have completed the step in question and that client never agreed that the lawyer would not be responsible for doing it. These types of allegations frequently arise on full service matters as well, but in the context of a limited scope engagement it becomes far more important to clearly establish the work the lawyer agreed and did not agree to do.

Comments on proposed additional commentary to Rule 2.01 – Competence

It is proposed that there be an addition to the commentary of Rule 2.01 as follows:

A lawyer may accept a retainer for limited legal services, but must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. Although an agreement for such services does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 2.02(X) [possible new rule on quality of service in limited legal services retainers]

The first sentence in the proposed commentary does properly emphasize that the lawyer must assess each case to determine that it is possible to competently handle the matter on a limited scope basis. However, in conjunction with the use of the term “limited legal service”, LAWPRO is concerned that the following statement from the middle sentence in this proposed commentary suggests that a lower quality tier of service is acceptable in the unbundled context: “...the limitation is a factor to be considered when determining the

legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” LAWPRO suggests that the middle sentence of this proposed commentary be amended so that it is clear that the discrete tasks the lawyer has agreed to take on as part of a limited retainer must be handled with the same legal knowledge, skill, thoroughness and preparation that tasks undertaken on a full retainer would be handled.

The last sentence in the proposed commentary properly notes the requirement that the lawyer ensures the client understands the nature, scope and implications of a limited retainer.

Comments on new proposed Rule 2.02(L) – Quality of Service/Rule 3.02(P) Advising Clients

It is proposed that a new rule and commentary be added that sets out the lawyer’s or paralegal’s obligation to provide candid advice about the limited retainer and to commit to writing the agreement between the lawyer/paralegal and client for the limited legal services. This would assist clients in understanding the nature of a limited retainer, and remind them of the limits on the service to which they agreed. The following is the proposal:

Limited Legal Services

2.02/3.02(X) Before providing limited legal services to a client, the lawyer/paralegal shall

(a) advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer/paralegal can provide, including, where appropriate, within the means provided by the client, and

(b) confirm in writing and provide the client with a copy of the agreement between the lawyer/paralegal and the client for the provision of the services.

The proposed new commentary to the new Quality of Service rule is as follows

Commentary

Reducing to writing the discussions and agreement with the client about limited legal services assist the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

A lawyer who is providing limited legal services should be careful to avoid acting such that it appears that the lawyer is providing full services to the client.

Proposed Rule 2.02(a) properly notes the requirement that the lawyer takes steps to ensure the client understands the nature, scope and implications of a limited retainer. However, while the means of the client should be considered, it should not be a factor that causes a lawyer to handle a matter in a less than competent way. Proposed Rule 2.02(a) should be amended so as not to suggest less than competent service is acceptable for a client of limited means.

Claims are more likely where the scope of services is ambiguous, either because the written retainer is ambiguous, or more likely, there is no retainer. Thus, as a matter of good practice and self-protection, retainers are probably the best way to avoid malpractice claims and post-matter disputes over the nature and extent of the retainer. Requiring a written retainer when limited scope services are being provided will help reduce post-matter disputes. However, while written consent to a limited representation is clearly a better or even a best practice, and should be encouraged in most settings, making it a requirement under the Rules might frustrate the ability of lawyers to provide unbundled services in some circumstances (e.g. duty counsel or clinic settings).

In Missouri, lawyers in limited scope representations must employ explicitly and plainly worded *Notice and Consent to Limited Representation* agreements, signed by the client, outlining the lawyer's role. This is a requirement per Missouri Rule of Professional Conduct 4-1.2 – Scope of Representation. The Rule provides a sample agreement for lawyers to follow. This Rule and the noted agreement appear in Appendix 1. Providing a similar sample agreement might be helpful for Ontario lawyers.

However, malpractice cases in the U.S. throw some doubt on how effective Limited Representation Agreements are in protecting against allegations of failing to inform the client of specific and reasonably identifiable risks beyond the limited scope representation. Informing a client *generally* that there are risks to a limited representation does not always protect the lawyer from allegations of damages arising from a *specific* harm. Further, claims arising in limited scope representations seem to result from the failure of a real meeting of the minds of the lawyer and the client on what the scope of the retainer was. That is, the lawyer understood what the extent of the lawyer's representation was, and the client understood what the extent of the lawyer's representation was, it was just that the two of them did not have the same understanding. Needless to say, this also happens when full service retainers are involved.

LAWPRO is uncomfortable with the following language in this proposed Commentary: "...should be careful to avoid acting such that it appears that the lawyer is providing full services to the client." The key issue here is not whether or not the lawyer provided full services to the client. The critical focus is being careful not to do work outside the agreed limited scope of the retainer. For example, a lawyer that agrees to represent a client in negotiations, but not in litigation, and then after negotiations fail takes steps to assist the client in preparing for trial, could face an argument that the client reasonably believed the lawyer agreed to broaden the representation by conduct. LAWPRO suggests that this Commentary be amended direct a lawyer to be careful to work on tasks within the limited scope of the retainer. It could also recommend a written retainer which provides that any expansion or change in the scope of the retainer must be confirmed in writing.

Clients not capable/competent

For the reasons detailed in the following paragraphs, LAWPRO takes the position that a limited scope representation will generally not be appropriate if a client's ability to make adequately considered decisions in connection with the matter or representation is impaired, whether because of minority, mental disability, or for some other reason.

Firstly, the central importance of consultation and informed consent in limiting the scope of a representation dictate that lawyers should be very careful in ever limiting the scope of a representation for an impaired client. How can one be sure that such a client truly understood the discussions and implications of a limited scope retainer?

Secondly, and building on the first point, if the lawyer believes an unbundled client cannot adequately act in his or her own interest, query whether they need to seek appointment of a guardian or take other protective action with respect to the client. As a practical matter, unless a guardian has been appointed, it would be prudent to take extra steps to represent the client since the client is unlikely to be able to look after him- or herself as well as a non-impaired client would, and any limitation on the scope of your representation is likely to be very carefully scrutinized with the clarity of hindsight.

Thirdly, the assistance of a lawyer on a limited scope basis should not place a client that is otherwise not capable or competent to handle the aspects of the matter or litigation not handled by the lawyer before a court or other situation where they are attempting to deal with a legal matter they are incapable of handling.

Comments on proposed additional commentary to the Client Under a Disability rule

It is proposed that there be an addition to the commentary of Rule 2.02(6) as follows:

A lawyer who is asked to provide limited legal services to a client under a disability should carefully consider and assess in each case whether, under the circumstances, it is possible to render those services in a competent manner.

It is LAWPRO's submission that this commentary should go beyond mentioning the general requirement of providing limited scope services in a competent manner to a client that is under a disability. Further to the comments in the previous three paragraphs, it should provide more specific direction and explicitly reference the requirement that the client under a disability must be able to understand the limitations the limited scope retainer and make adequately considered decisions in connection with the conduct and carriage of the matter or representation on issues that the lawyer is not handling for the client.

Termination of an unbundled representation

Our ethics and court rules address the circumstances under which a lawyer must or may withdraw from representing a client or refuse to represent a client, and set forth the obligations of the lawyer upon termination of the engagement. Of course, a lawyer should not undertake representation unless the lawyer can perform the necessary tasks competently, promptly, without conflict of interest and for a reasonable fee. Once a lawyer undertakes to represent a client, there is an implied obligation to carry out the

representation to its conclusion. And even after the relationship is terminated, the lawyer must take continued steps to protect the interests of the former client, including surrender of the file, return of property and unearned fees, and continuing duties of confidentiality and loyalty. LAWPRO takes the position that the currently existing obligations under the ethics and court rules with respect to the termination of representation should apply equally to the provision of unbundled legal services, in the context of the scope of work covered by the retainer.

Comments on the proposed amendments to Rule 2.09(L)/Rule 3.08(P) - Withdrawal from Representation

Noting that it is included for comment and not for adoption at the present, the proposed amendment to Rule 2.09 is as follows:

2.09/3.08(X) A lawyer/paralegal providing limited legal representation for a client is deemed to have withdrawn from representation when the lawyer has completed the matter that was the subject of the representation.

The additional proposed commentary for Rule 2.09(L) is as follows:

Upon completion of the matter, the lawyer should confirm in writing to the client that the representation is complete. Appropriate notice of this fact should also be provided to the court and, where necessary, to opposing counsel.

LAWPRO is unsure of the logic or justification for deeming a withdrawal from representation upon completion of a limited retainer. While conceptually something that would be nice to happen, practically speaking the termination of the representation needs to be communicated to others that are involved in the matter. This is contemplated in the proposed Commentary and LAWPRO suggests these comments be included in the Rule.

Also, as drafted the additional Commentary provides for the giving of a notice of the completion of a limited scope retainer to the court and, where necessary, to opposing counsel. It does not contemplate notice to an unrepresented party on the other side of a matter – likely a common scenario. This could be addressed by simply adding “or the opposing party” at the end of the proposed commentary.

The ghostwriting of pleadings and going on or off the record

Clearly, one of the most controversial issues with respect to the unbundling of legal services is the ghostwriting of pleadings for filing by a self-represented litigant. The term “ghostwriting” means that a lawyer prepares a pleading for a litigant who files it without disclosing that he or she had the assistance of a lawyer in drafting the document. Ghostwriting assistance can differ greatly by degree of lawyer involvement: it can range from only drafting the originating process to behind-the-scenes writing throughout the

proceeding. In an unbundled legal services context, a key aspect of ghostwriting the pleadings is that the lawyer is not formally “on the record.”

The ghostwriting of pleadings raises a number of interesting issues, many of which have no easy or obvious answers. Perhaps the largest concern surrounding ghostwriting is the potential for breaches of rules of professional and ethical conduct, including the duty of candour toward the court, the duty of fairness to the opposing party, the duty of competent representation, and the duty to avoid bringing non-meritorious claims. Another practical concern is what role and responsibilities the lawyer should have in relying on representations of the clients and in making any of the certifications required on ghostwritten pleadings.

Another issue that comes up in the context of ghostwriting of pleadings is whether the client is deemed “represented” or “unrepresented” for purposes of the rules which govern a lawyer’s communication with a represented or unrepresented party. Another issue is whether the lawyer who prepared the pleading is making an appearance before the court, and if so, what obligations does that trigger?

And further to these points, what happens if there is a breach of the rules or improper certification? Is the lawyer who prepared the pleading subject to the rules and any disciplinary procedures that may follow?

In the U.S. the concerns surrounding the ghostwriting of pleadings have been handled in many different ways. While generally universally frowned upon (and even expressly condemned) outside the context of providing unbundled legal services, the ghostwriting of pleadings is now almost universally accepted as an appropriate type of assistance that a lawyer might provide to a client on an unbundled basis.

However, the manner in which various states handle the ghostwriting of pleadings is extremely varied. Some states specify that assistance by a lawyer in drafting pleadings need not be disclosed, while others specify that it must be disclosed. The manner of that disclosure varies from a simple acknowledgement that assistance by a lawyer occurred (the name of the lawyer is not disclosed), to a requirement that the name (and in some cases signature) of the assisting lawyer appear on the pleading, and almost 20 states have amended ethics and court rules to provide that the lawyer is named and has the ability to appear in court on a limited basis (i.e. appearing in court on more than a special appearance {e.g. to challenge the court’s jurisdiction}) but in a manner that is less than a full “on the record” appearance).

Under our ethics and court rules, drafting pleadings and appearing on the record on a matter triggers a number of ethical obligations on the lawyer and other parties and counsel involved in the matter. The ghostwriting of pleadings and the various issues it raises in the context of providing unbundled legal services is not addressed and is one area that will likely require amendments and possibly new provisions in both the Rules of Professional Conduct and the Rules of Civil Procedure.

Comments on proposed amendments to Rule 4.01(L) – The Lawyer as Advocate/Rule 4.01(P) – The Paralegal as Advocate and Rule 6.03 (L) – Responsibility to Lawyers and Others/Rule 4.02(P) – Interviewing Witnesses

As drafted, these proposed amendments provide for notice to the court/court and, where necessary, to opposing council. They do not, however, contemplate notice to an unrepresented party on the other side of a matter – likely a common scenario. In appropriate places these rules should also reference “the opposing party.”

Conclusion

LAWPRO is concerned that the more widespread provision of “unbundled” legal services in Ontario will increase malpractice claims. The source of this concern is that the root causes of the most common malpractice errors that LAWPRO sees are at least equally, if not more likely, to occur during the provision of unbundled legal services.

Unbundled legal services are one of the solutions to the complex issue of access to justice, and LAWPRO recognizes that the provision of unbundled legal services is occurring in Ontario at the present time and that they are likely to become more common.

However, it should be recognized that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems. LAWPRO feels that any effort to encourage or facilitate the broader use of unbundled legal services should include the consideration of all relevant issues with the goal of ensuring that clients get competent representation on all matters, including those provided on a limited scope basis.

In a nutshell, LAWPRO’s position is that all the rules that apply to full representation should also apply to unbundling or limited scope representation. Limited scope representation should not mean less competent or lower quality legal services. Lawyers providing unbundled legal services owe the same duties of competence, diligence, loyalty and confidentiality to limited-scope clients that they owe to full-service clients. As compared to a full scope representation, there may be fewer tasks performed by the lawyer on a limited scope matter, but the competency and quality of the work done on those tasks must not be less than it would be on a full service matter. It is critical that lawyers identify the discrete collection of tasks they can undertake on a competent basis when handling an unbundled matter, and it is clear to the lawyer and the client what tasks the lawyer is responsible for, and those for which the lawyer is not responsible. Ideally this should be done in a written retainer as post-matter disputes over the scope of work to be done are far more likely if the retainer is ambiguous and/or not in writing.

If the greater provision of unbundled legal services is to be encouraged and facilitated through changes to the Rules of Professional Conduct and the Rules of Civil Procedure, LAWPRO suggests that the goal of ensuring more satisfied clients and reduced malpractice claims can be attained by highlighting how the basic principles behind the ethics and court rules apply equally in the context of unbundled services. Some issues,

such as the ghostwriting of pleadings and limited court appearances, will likely require Rules changes.

We hope that our comments provide helpful insight on the consideration and implementation of the steps to be taken to facilitate the greater provision of unbundled legal services in Ontario. We would be pleased to answer any questions that arise further to our submissions or provide further information in support of our submissions.

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Resources:

The National Center for State Courts website has a list and gives a brief description of the unbundling rules in U.S and a link to each rule. (<http://www.ncsc.org/topics/access-and-fairness/self-representation/state-links.aspx?cat=Unbundling%20Rules>)

Appendix 1 - Missouri Rule of Professional Conduct 4-1.2 – Scope of Representation

RULE 4-1.2: SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to Rule 4-1.2(c), (f) and (g), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role. Use of a written notice and consent form substantially similar to that contained in the comment to this Rule 4-1.2 creates the presumptions:

(1) the representation is limited to the lawyer and the services described in the form, and

(2) the lawyer does not represent the client generally or in any matters other than those identified in the form.

(d) The requirement of a writing signed by the client does not apply to:

(1) an initial consultation with any lawyer, or

(2) pro bono services provided through a nonprofit organization, a court-annexed program, a bar association, or an accredited law school,

(3) services provided by a not-for-profit organization funded in whole or in part by the Legal Services Corporation established by [42 USC Sec. 2996b](#).

(e) An otherwise unrepresented party to whom limited representation is being provided or has been provided is considered to be unrepresented for purposes of communication under [Rule 4-4.2](#) and [Rule 4-4.3](#) except to the extent the lawyer acting within the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is

otherwise self-represented.

(f) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(g) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] A lawyer may assist a self-represented litigant on a limited basis without undertaking the full representation of the client on all issues related to the legal matter for which the lawyer is engaged. Any doubt about the scope of representation should be resolved in a manner that promotes the interests of justice and those of the client and opposing party. Use of a written agreement for limited representation is required, except as provided in this Rule 4-1.2. If a written agreement is not required by Rule 4-1.2, the better practice is for the attorney to memorialize in writing the contact and services provided. The initial consultation ends when the lawyer and the client agree that the lawyer will or will not undertake the representation. A lawyer may provide legal advice during an initial consultation. The lawyer shall explain to the client the risks and benefits of limited representation during consultation on limiting the scope of representation. An agreement for limited representation does not exempt a

lawyer from the duty to provide competent representation; however, the limitation of the scope of representation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation as required in [Rule 41.1](#).

The following is a notice and consent to limited representation form that is appropriate:

Notice and Consent to Limited Representation

To help you with your legal matters, you, the client, and _____, the lawyer, agree that the lawyer will limit the representation to helping you with a certain legal matter for a short time or for a particular purpose.

The lawyer must act in your best interest and give you competent help. When a lawyer and you agree that the lawyer will provide limited help:

- The lawyer DOES NOT HAVE TO GIVE MORE HELP than the lawyer and you agreed; and

- The lawyer DOES NOT HAVE TO HELP WITH ANY OTHER PART of your legal matter.

While performing the limited legal services, the lawyer:

- Is not promising any particular outcome; and

- Is relying entirely on your disclosure of facts and will not make any independent investigation unless expressly agreed to in writing in this document.

If short-term limited representation is not reasonable, a lawyer may give advice, but will also tell you of the need to get more or other legal counsel.

I, the lawyer, agree to help you by performing the following limited services listed below and no other service, unless we revise this agreement in writing.

[INSTRUCTIONS: Check every item either **Yes** or **No** - do not leave any item blank. Delete all text that does not apply.]:

Y N

a) ___ ___ Give legal advice through office visits, telephone calls, facsimile (fax), mail or e-mail

- b) ___ ___ Advise about alternate means of resolving the matter including mediation and arbitration
- c) ___ ___ Evaluate the client's self-diagnosis of the case and advise about legal rights and responsibilities.
- d) ___ ___ Review pleadings and other documents prepared by you, the client
- e) ___ ___ Provide guidance and procedural information regarding filing and serving documents
- f) ___ ___ Suggest documents to be prepared
- g) ___ ___ Draft pleadings, motions and other documents
- h) ___ ___ Perform factual investigation including contacting witnesses, public record searches, in-depth interview of you, the client
- i) ___ ___ Perform legal research and analysis
- j) ___ ___ Evaluate settlement options
- k) ___ ___ Perform discovery by interrogatories, deposition and requests for admissions
- l) ___ ___ Plan for negotiations
- m) ___ ___ Plan for court appearances
- n) ___ ___ Provide standby telephone assistance during negotiations or settlement conferences
- o) ___ ___ Refer you, the client, to expert witnesses, special masters or other attorneys
- p) ___ ___ Provide procedural assistance with an appeal
- q) ___ ___ Provide substantive legal arguments in an appeal
- r) ___ ___ Appear in court for the limited purpose of _____

- s) ___ ___ Other: _____

I will charge to the Client the following costs: _____

I will charge to the Client the following fee for my limited legal representation:

Date: _____
[Type Lawyer's name)

CLIENT'S CONSENT

I have read this Notice and Consent form and I understand it. I agree that the legal services listed above are the ONLY legal services to be provided by the lawyer. I understand and agree that the lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me more legal help. If the lawyer is giving me advice or is helping me with legal or other documents, I understand the lawyer will stop helping me when the services listed above have been completed. The address I give below is my permanent address where I can be reached. I understand that it is important that the court handling my case and other parties to the case be able to reach me at the address after the lawyer ends the limited representation. I therefore agree that I will inform the Court and other parties of any change in my permanent address.

In exchange for the Lawyer's limited representation, I agree to pay the attorney's fee and costs described above.

Sign your name: _____

Print your name: _____

Print your address: _____

Phone number: _____

FAX: _____

Message Phone: _____

Name: _____

Email address:

[3] In a case in which the client appears to be suffering a mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to [Rule 4-1.14](#).

Independence From Client's Views or Activities

[4] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means

[5] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[6] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate [Rule 4-1.1](#) or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

[7] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[8] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by [Rule 4-1.6](#). However, the lawyer is required to avoid furthering the

purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

[9] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[10] Rule 4-1.2(f) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Rule 4-1.2(d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of Rule 4-1.2(d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.