

The Limited Scope Retainer



THE CANADIAN
BAR ASSOCIATION
Alberta Branch

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The Honourable
Jonathan Denis, QC
Minister of Justice
& Solicitor General

One of the goals and priorities of Alberta Justice and Solicitor General is to ensure Alberta has a fair, accessible, and innovative justice system that puts Albertans first.

At the first Joint Action Forum on Civil and Family Justice recently held in Edmonton in November, 2013, judges, lawyers, academics and representatives from organizations throughout

the province discussed the many and complex issues regarding access to justice in this province. The consensus was that many Albertans face significant challenges when they seek justice.

What was revealed in the Forum was that many Albertans view the justice system to be:

- intimidating;
- inefficient;
- resistant to changes that could make it better; and
- expensive.

One of the results of high legal costs is that an increasing number of Albertans are now representing themselves - which highlights these problems and limits the access to justice. The consequences of limited access to justice have a domino effect on family life including economic stability, health, safety, and security. Closer examination of these problems indicates that they do not affect only low income earners. More and more middle-class, middle-income earners in Alberta are being affected by legal costs that, for them, are out of reach, especially in the area of family law.

Many litigants are choosing to represent themselves, believing they either do not need, or cannot afford, full service legal representation by a lawyer. Self-represented litigants may not earn enough to hire a lawyer, but earn too much to access Legal Aid.

Limited scope retainers, or unbundling, can help alleviate, not only the strain on families and individuals, but the strain on our justice system.

The province has supported limited scope retainers for legal services for some time now. Limited scope retainers are a viable option for Albertans who cannot afford full legal representation because a one-size-fits-all approach is not going to give Albertans the best legal

representation possible. We need to work together to encourage this option as a way to meet the legal needs of Albertans in a timely and affordable way.

Though limited scope retainers are mainly a private practice issue, the effects of not having this choice available on a large scale throughout the province is ultimately felt by all Albertans by its impact on the justice system. Lawyers and their clients must be able to freely negotiate with minimal interference so clients can retain some control and save money by doing some of the legal work themselves. This makes legal advice more affordable, and our justice system more accessible for all.

The province is growing rapidly and sheer population growth means we need to do our work differently to ensure fair and equitable access to justice for all. We need to work together to achieve a justice system that fits in with what Albertans need and want. Let's look at the big picture to come up with solutions that are based on individuals' and families' needs. One important part of this picture is to look at new ways of delivering legal services.

We need to look at new models. Let's focus our efforts on the future and work together to change the way legal services have traditionally been provided in this province and forge a "made-in-Alberta" solution that helps self-represented litigants access legal advice and services. Self-represented litigants in Alberta would benefit from being able to choose to access unbundled legal services and, in the context of access to justice, all Albertans would benefit from limited scope retainers. The work of the Law Society of Alberta in this area is appreciated and the recent amendments to the *Code of Conduct* are a step in the right direction. The province supports limited scope retainers and believes Albertans should be able to access unbundled legal services.

Government does not have all the answers and we must respect that the law is a self-governing profession. We all need to acknowledge the role we play in that system. There are no easy or simple solutions, or they would be in place today. The system needs to change and we all have a stake in making those changes. We need to have the support of the legal profession, judges and other justice system partners to bring about positive change. Together, we can work toward a fair, accessible, and innovative justice system for all Albertans. 🌸



Ola Malik,
Chair, CBA
Alberta Access
to Justice
Committee

On behalf of the Access to Justice to Committee, Canadian Bar Association, Alberta Branch, I am delighted to introduce you to this special electronic supplement which is devoted in its entirety to the issue of the Limited Scope Retainer (“LSR”).

The purpose of this publication is to provide a discussion regarding the opportunities and challenges which are presented by the LSR. Our contributors approach the

LSR issue from different perspectives, offer a broad representation of views, and explore many of the practical issues which you need to carefully consider before deciding whether to adopt the LSR as part of the menu of services which you’re prepared to offer. Ultimately, we leave it to you to decide whether the LSR model is right for your practice. We’re confident that the authors who have contributed to this publication will have provided you with some of the guidance you’re looking for.

While the LSR model is usually spoken of in the context of unbundling legal services to better address the access to justice deficit, the LSR has significant benefits to the legal profession. Most people cannot afford the cost of a general service retainer and will therefore never ask a lawyer for help. But some legal help at an affordable cost is better than none. In appropriate circumstances, the LSR may enable those who cannot afford to pay for the cost of a general service retainer to get help with those legal tasks they feel they cannot perform themselves. This allows the client to exercise control over those parts of the file they feel comfortable handling but recognizes that a client will need help from a lawyer along the way. The LSR provides lawyers who are prepared to offer limited scope representation with legal work they would previously not have had and with significant business opportunities for providing services to a much larger market.

As many of our contributors note, the full cost of a general retainer is out of the grasp of most Canadians. Robert Harvie, QC explains why the LSR may open up new market opportunities for enterprising lawyers and Ed Gallagher outlines how his law firm has gained a unique competitive advantage by adopting the LSR model and flat-fee billing. Dr. Julie Macfarlane provides the public’s perspective on how the legal profession’s reticence in providing the LSR service is confusing to a public which is increasingly looking for legal services to be provided in this fashion. Marie Gordon, QC’s article articulates a powerful case for incorporating the LSR

into a family law practice and Gillian Marriott, QC and Joshua Lam argue that the LSR model expands the opportunities for providing pro bono work. Mr. Justice Jerke’s perspective from the bench is encouragingly optimistic.

However, despite how badly you might feel for a client who cannot afford the cost of a general retainer, the LSR may not always be an appropriate answer. You need to assess whether your client and their legal issues are good candidates for the LSR model, whether you properly understand the implications of adopting the LSR and whether you can effectively manage the risk which may arise.

In her article, Nancy Carruthers discusses the new rules and their accompanying commentaries which address LSRs in the Code of Conduct, including the new commentary to rule 2.01(2), new rules 2.01(1.1), 6.02(8.1), and existing rule 2.27 of the Alberta Rules of Court. I’m going to guess that most of you don’t like getting sued for professional malpractice and would therefore strongly suggest that you read Anne Kirker, QC and Jennifer Blanchard’s article which addresses some risk management strategies. The piece written by Jeannette Fedorak, QC provides some excellent practical tips to keep in mind as well. Michael Bates and Jennifer Ruttan provide a thoughtful explanation as to how and why most criminal practitioners should already be familiar with the LSR approach and provide a word of caution before embarking into the LSR in the criminal law context. Finally, Andrea Doyle and Jocelyn Hill discuss Legal Aid Alberta’s deliberative strategy in adopting the LSR and helpfully provide some links to precedents, including various court forms, FAQ sheets for clients and lawyers, and a sample LSR agreement.

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Each of our contributors made this project possible. I am very grateful to each of them. I want to thank Gillian Marriott, QC and Rob Harvie, QC who served with me on the CBA’s Access to Justice Committee in respect of this project. Lee-Anne Wright is the Communications and Marketing strategist for the CBA and did an absolutely outstanding job putting this publication together. ❁



**Kevin Feth, QC,  
President-Elect,  
Law Society  
of Alberta**

The legal profession is in the midst of an unprecedented era of change. Globalization, technology, increased competition, labour mobility, and lawyer regulation are transforming the delivery of legal services. Client expectations have changed. The public now demands that lawyers be more innovative in providing discrete services, at predictable costs, in ways that are affordable for a larger section of society.

Limited scope retainers (“LSRs”) offer both challenges and opportunities for the legal profession. Lawyers spend much of their time anticipating and trying to reduce risk for their clients. As a consequence, the profession can be overly risk adverse and resistant to change. The profession often views unbundled legal services as unusual, imperfect, and risky. However, this approach focuses too much on the lawyer’s perspective, rather than on what the client needs.

A guiding principle of our profession is that our clients’ needs come first. The profession’s behaviour adapts to meet those needs.

A growing segment of Canadians either cannot afford the traditional delivery model of full scope legal representation or simply do not want it. The “do it yourself” culture spurred on by the internet and social media has promoted greater self-representation. Clients increasingly want more control over their legal affairs. A “consumer focus” to the delivery of legal services compels lawyers to tailor their services to their clients’ preferences. This is the new reality.

The legal profession has a social and ethical responsibility to develop a model for the delivery of legal services that makes sense for both clients and lawyers. Any delivery model must recognize that the client is the ultimate decision maker with respect to the scope of the legal services to be provided. The lawyer’s desire to do that which is best for the client must take into account the financial realities, and informed choices, of the client.

Some lawyers might feel uncomfortable with a delivery model that is perceived by them as imperfect or that demands deviation from tradition. But the option of withholding limited scope service in favour of an “all or nothing” delivery model does a disservice to the public.

In our complex legal system, having lawyers act for clients is often critically important. Lawyers guide their clients through a system which is difficult to understand and navigate. Lawyers serve as a buffer between parties in conflict. They assist in collecting relevant information, interpreting that information, and explaining how it should be presented to a third party. They anticipate clients’ unrecognized needs. The legal system is not designed to function without substantial lawyer engagement. However, that does not mean that lawyers are required at every stage of legal proceedings, and for every client.

LSRs provide the opportunity to assist clients where assistance is most needed and in ways that maximize value for the client and reduce the burden on the legal system. Further, LSRs can actually improve the quality of legal services by focusing on efficiency and the client’s core strategic needs, and by providing an up-front assessment of costs. In order to effectively provide services through the LSR, the lawyer needs to clearly understand the client’s goals, identify the legal work required for the resolution of the legal problem and break the legal work into discrete tasks. These tasks are susceptible to predictable costing, including flat fees. This approach can more effectively manage expectations and enhance the client’s perception of the value received.

The increased emphasis on strategic priorities, efficiency, and the division of tasks between lawyers and “non-lawyers” can also benefit full-scope legal services. As the profession becomes more sensitive to this type of file management, full scope legal work will benefit through more effective delegation of discrete legal tasks to less costly professionals and assistants and by defining the work which might properly be handled by the client. Even sophisticated corporate clients are increasingly demanding this kind of project management from their legal counsel.

Another opportunity provided by LSRs is enhanced job satisfaction for lawyers who do not enjoy the full scope practice model and who want to restrict the scope and demands of their practices. This can empower lawyers to work part-time, or from home. It can also open up an existing legal practice to new clients and new service delivery models.

LSRs can benefit the public, lawyers and the legal system. The Law Society of Alberta remains committed, through its Code of Conduct and communications to the profession, to making unbundled legal services a common practice that serves the public interest. ❁

## Why Me, Why Now?



Robert  
Harvie, QC

This special publication is dedicated to the concept of the “Limited Scope Retainer” and I’ve been tasked with writing a “gateway” article. Like most of you, I have a pretty busy practice. So, balance that with the demands of family and other volunteer obligations, and all I can say is, well... “yay!!!!” for

something more to add to the pile.

And such is the reaction I’m sure, of most lawyers reading this publication. We’re already working hard. The heavy demands of our clients, our obligations to our Law Society, the needs of our spouses, partners and children do not for a happy lawyer make – so asking us to add something new to the pile isn’t necessarily a welcome experience.

Understanding that perspective and understanding what it’s like to balance a law practice and a life, my thought is to answer the obvious question most lawyers have about the Limited Scope Retainer (“LSR”) – “**Why me, why now?**”

### What is the Limited Scope Retainer?

Most of us were first exposed to the concept of LSRs during the roll-out of the new Rules of Court in November 2011. At that time, our profession was engaged in a discussion that centered upon the role of a lawyer who appears **in court** on behalf of their client on a very limited and delineated basis.

However, the concept of the LSR is much broader than restricting a lawyer’s in-court function. The LSR encompasses **any retainer** a lawyer accepts which does not require the lawyer to be retained to represent a client’s interests in the typically broad fashion we are used to – that is, where the lawyer is responsible for **all legal aspects** of a client’s matter.

A typical LSR might only include one or more (but not all) of the following aspects of a general retainer:

- Drafting of pleadings without going to court - commencement pleadings, interlocutory pleadings, etc;

- Providing legal advice without going to court with respect to:
  - the matters in issue generally;
  - a specific aspect of the client’s matter, i.e. “Can you calculate how much child support my children’s father should be paying?”; and
  - strategic advice regarding a specific stage of the legal process, i.e. “how should I present my application to a Judge?”
- Limited representation without going to court, i.e. settlement negotiations, mediation, collaborative law or other types of limited dealings with the opposing party; and
- Limited representation which requires the lawyer to go to court at various stage(s) of the litigation process, i.e. conducting interlocutory applications, appearing in pre-trial or case management conferences, etc.

### Why should I consider Limited Scope Retainers as part of my practice?

#### a) The LSR Expands Lawyer’s Potential Market Share

The legal profession has shown a great commitment to fostering access to justice through the expansion of pro bono services. This distinguishes the legal profession from perhaps any other profession. Lawyers have consistently demonstrated that their commitment to the justice system projects further than their own narrow business interests and encompasses a deep resolve to help those who cannot afford to pay for their services.

However, even at best, assistance provided through Legal Aid and pro bono services can only scratch the surface of the needs of the public regarding access to legal information and services.

It is in this respect that the concept of the LSR may be a tool to facilitate access to justice in a sustainable fashion by providing meaningful legal services to a much larger segment of our society while allowing the lawyer to make a good living.

As an example, consider that in the State of California up to 70% of all family law matters include a self-represented litigant. According to more recent studies in Canada undertaken by Dr. Julie Macfarlane,

that number may be similar to what we are seeing in some family law matters in Canada as well.

According to some studies, the choice of legal representation for the majority of those self-represented litigants is either self-representation or representation by a lawyer through the LSR – but not a general retainer service. As such, by delivering legal services to your client through the LSR, you open your practice to a new demographic without excluding your existing clientele.

What might this new demographic mean to you in real terms?

Think about the global net income before tax of retail delivery services such as Wal-Mart compared to Neiman Marcus in 2012:

|               |               |
|---------------|---------------|
| Wal-Mart      | \$26 billion  |
| Neiman Marcus | \$140 million |

The difference? **More than \$25 billion.**

Why is that? Well, if one looks at broad income demographics, we discover that most people can afford to shop at Wal-Mart but not everyone can afford the luxury offerings of Neiman Marcus.

Figures from Statistics Canada (as of June 2012) provide us with a clue as to how many Canadians might be able to afford to hire a lawyer on a general retainer basis. The following is a breakdown of annual income for Canadians:

The number of Canadians who earn an annual income of more than \$100,000.00 per year is 1,446,580 (5.7% of Canadians).

The number of Canadians who earn an annual income of less than \$100,000.00 per year, but more than \$35,000.00 per year is 9,296,700 (36.85% of Canadians).

Think about these numbers for a moment.

At the very most, the **total** potential market share of those who might be able to afford a lawyer on a general retainer is 5.7% of the population. The potential market share for those prepared to offer their services by way of the LSR is, well, **everyone else.**

**This is why Wal-Mart earns 189 times more than Neiman Marcus.**

Now, consider that approximately 41% of all marriages end in divorce<sup>1</sup>. How much business are lawyers taking off the table if they ignore the vast majority of Canadians who simply can't afford to pay for their legal services on a general retainer basis?

That's called market share. That's called "economic opportunity". Wal-Mart saw it – and so might some enterprising lawyers in our midst.

### **b) The LSR Limits Exposure to Collecting on Out-of-Control Receivables**

Lawyers earn and report income on an accrual basis which is accounting talk for: "we pay tax (income and GST) on what we bill, not on what we collect". This means that for most family lawyers, paying taxes on accounts receivable and expending resources on collecting accounts receivable is an issue.

For most LSRs, money can be collected for the whole or your efforts **in advance**, because the bills are typically much smaller and agreed to in advance of work commencing. Even if the client is billed as work under the LSR progresses, the lifespan of the LSR is likely to be shorter than those legal services provided through a general retainer which can stretch on for years.

### **c) The LSR Reduces the Lawyer's Exposure to Risk**

At their core, many Law Society complaints are about excessive or unjustified billing. Keep in mind that while the wording of complaints may refer to the quality of legal service provided, many of these complaints arise out of a client's perception that having been provided with shoddy work, they were also given an exorbitant legal bill.

The LSR typically reduces the chances of mushrooming receivables, keeps client expectations as to billing in check and, in the bargain, reduces one of the significant sources of client dissatisfaction with their lawyer.

Experience in the U.S. suggests the chances of being sued are significantly less if you are hired on the LSR basis. According to the American Bar Association 2003 "Handbook on Limited Scope Legal Assistance":

Lawyers who provide limited assistance to clients do not report problems in obtaining malpractice insurance. This is not surprising. There is a high degree of client

<sup>1</sup> Statistics Canada Report, "Divorce cases in civil court, 2010/2011", Mary Bess Kelly, March 28, 2012.

satisfaction with limited assistance. This has led to an extremely low incidence of malpractice claims.

M. Sue Talia has had over 25 years of experience as a family lawyer. She remarked: “[E]xperience has demonstrated that as with mediation, there are fewer rather than more malpractice claims when lawyers unbundle services.” Furthermore, she stated: “Years ago, when mediation was new and untried, some carriers denied coverage, or even raised rates, because they thought liability would increase. The reverse happened. People were so happy with the results they obtained themselves with the assistance of their mediator that claims *decreased*.” She added: “Now, most malpractice insurance rates for mediators are lower than for traditional family law attorneys.”<sup>2</sup>

...A national expert on hotline services, Michael A. Cane, explains why he believes the incidence of malpractice claims for limited representation may be so low. He calls this form of representation “client-centered”, and contrasts it with what he calls the “attorney-centered” model of full representation:

When an attorney says to a new client, put your money down and trust me to care for your legal problems, he takes away the client’s control and thus takes on all the responsibility. So then why is it so surprising when the client later sues for malpractice, or files a bar complaint, simply because the case didn’t go as he wanted?

Cane contends that limited representation gives many clients what they want: “(1) control, (2) price, and (3) service.”<sup>3</sup>

## Why?

With a general retainer, clients often feel they are “handing off” their problem to the lawyer. When matters are not resolved to the clients’ satisfaction, the first person they will assign blame for that

<sup>2</sup> M. Sue Talia, “A Client’s Guide To Limited Legal Services” (1997) @ p. 35.

<sup>3</sup> Michael A. Cane, Welcome to the Information Highway 2, *in* The Changing Face of Legal Practice: A National Conference on “Unbundled” Legal Services (Vol. 4, 2000) @p.6.

outcome is the person they handed over their problems to -- their lawyer.

On the other hand, it is less likely that the lawyer will be seen to be the cause of the client’s disappointment when a lawyer clearly outlines the scope and limits of the services they are prepared to provide. This may explain why the LSR model results in fewer law society complaints and fewer professional malpractice lawsuits.

## d) The LSR Reduces The Lawyer’s Stress

The attrition rate for young lawyers is a growing issue in our profession. Whether for female (particularly) or male lawyers, some 40% of lawyers leave the practice within 5-7 years of their year of call.

Our job, particularly as family lawyers, is stressful and difficult. I’ve been a family lawyer for more than 28 years. A few years ago during a conference in San Diego, a relatively newly minted lawyer from Los Angeles asked me: “How do you do it? How do you go home every night with your clients’ problems on your shoulders and survive?”

My reply? I don’t.

I give certain responsibilities back to my clients. I force them to make the difficult decisions. I provide them with guidance and advice. But at the end of the day, whether the client settles or litigates is up to them. While this may sound callous to some, I think it reflects what the proper relationship between a lawyer and his or her client should be. And since adopting this practice -- of forcing control and responsibility over critical decision back upon the client -- I find myself sleeping better at night, arguing less with opposing counsel, and by and large, having happier clients.

As alluded to in the comments from Michael A. Cane, transferring responsibility and control back to the client is central to the idea of the LSR. The client is given – and **asks for** – the responsibility for exercising control over their file.

Rather than running away from the LSR, we should be running towards it. The LSR gives you the ability to say in a very direct and obvious way: “My clients’ problems are not MY problems” -- “my job is, well, a job, a task – to be performed to the utmost of my skill and ability – but at the end of the day, a limited and defined task”.



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The LSR offers an incredible potential win/win for the public and for the legal profession as it provides:

- **An expanded market share for lawyers** in a difficult economy while also addressing the legal profession's commitment to facilitating greater access to justice for those who cannot afford to pay for legal services on a general retainer basis;
- **More affordable and predictably priced legal services for the public** without the danger of mushrooming and out-of-control receivables and legal bills; and
- **A legal practice with reduced stress and greater satisfaction.** ☼

Robert Harvie, QC, is a partner at Huckvale Wild Harvie MacLennan LLP in Lethbridge, Alberta. He has practiced law in Lethbridge for the past 27 years since graduating with a law degree from the University of British Columbia in 1985. He practices solely in the area of Family Law Litigation and Family Law Dispute Resolution with emphasis on Property and Financial Disputes. Mr. Harvie has attained extensive training in Mediation and Collaborative Law, having attended mediation training with the Legal Education Society of Alberta, and annual Collaborative Law conferences with the International Association of Collaborative Professionals - helping his clients find alternate ways of resolving their disputes without going to court. Mr. Harvie has taught business law as a sessional instructor at the University of Lethbridge, and has presented papers to members of the legal profession through the Legal Education Society of Alberta. Additionally, he has provided mediation training for the Government of Alberta.

Ethical and Practical Issues



Nancy Carruthers

In Canada, we prize the rule of law and the role that lawyers play in our justice system. Yet many citizens cannot afford to access the justice system in a meaningful way as they cannot afford legal counsel.

Limited scope retainers have been identified as one solution to increase access to justice. They

make legal services accessible to those who cannot or will not engage a lawyer on a full retainer.

The “New” Rules

On October 3, 2013, the Benchers of the Law Society of Alberta passed amendments to the *Code of Conduct*, introducing new rules and commentary intended to heighten the awareness and use of the limited scope retainer (“LSR”). The amendments are similar to those recently adopted by the Law Society of Upper Canada and the Federation of Law Societies of Canada.

Lawyers have been offering LSRs for years in a number of different practice areas. Alberta’s ethical codes have contemplated LSRs in their commentaries since 1995. The new rules are not meant to create new standards for lawyers. They simply confirm existing standards and best practices. While the terms of the retainer define the legal services the lawyer will perform, the retainer does not limit the fiduciary duties owed to the client. Other ethical rules still apply regarding confidentiality, conflicts and duties to incapacitated clients.

The *Code* amendments address some of the more pressing ethical issues lawyers face when dealing with LSRs but do not address them all. The recent *Code of Conduct* amendments deal primarily with three issues:

- The extent to which the scope of lawyers’ work may be restricted;
- The requirement to advise a client of the nature and scope of services to be performed; and

- Guidelines for lawyers’ communication with an opposing party who has retained a lawyer for a limited purpose.

What is the LSR?

The LSR is now defined in the *Code* as **an agreement for the provision of legal services for part, but not all, of a client’s legal matter**. LSRs occupy the middle ground between full representation and no representation.

LSRs, also known as unbundling or discrete task representation, may be used to provide a client with a variety of services, including:

- Legal advice and/or research;
- Document review, preparation and/or filing;
- Factual investigations;
- Participating in questioning, court appearances, mediations or negotiations;
- Coaching the client to appear on their own behalf;
- Coaching the client for a negotiation; and
- Identifying and referring the client to experts, and providing guidance on how to independently instruct the expert.

Threshold Issues: When can you use the LSR?

The new commentary to Rule 2.01(2) deals with lawyers’ competence, and states:

Lawyers owe clients a duty of competence, regardless of whether the retainer is a full service, or a limited scope retainer. When a lawyer considers whether to provide legal services under a limited scope retainer, the lawyer must consider whether the limitation is reasonable in the circumstances. For example, some matters may be too complex to offer legal services pursuant to a limited scope retainer...

LSRs are not for all clients or for all types of problems. When assessing whether a LSR is reasonable, lawyers must consider:

- the capability of the client;
- the nature and importance of the legal problem;
- the degree of discretion held by the decision-maker;
- the type of dispute resolution mechanism; and
- the availability of other self-help resources.

Some writers on the topic believe that some help is better than none, even for a client who may not be able to follow through effectively. Others are of the view that, if the circumstances make it difficult to effectively assist the client, the lawyer should either decline to act or provide full service for a reduced fee.

The client must understand and acknowledge the limitations on the scope of services being offered, any associated risk, and must provide informed consent. To obtain informed consent, the lawyer must explain the risks of a limited retainer as well as available alternatives. For example, lawyers should tell clients that they may face unexpected legal or evidentiary issues which they will not be able to understand or manage. Lawyers should advise a client if a matter is too complex and recommend that the client seek more extensive legal services.

Lawyers may not be able to limit their liability to clients and still have a duty to competently perform the services contemplated in the retainer. The LSR is not an excuse to engage in “lawyer lite” services. The scope of work may not be so limited that the lawyer has no obligation to provide meaningful advice.

Sometimes it is simply not possible or reasonable to provide limited scope services.

The nature of the client is also a matter to consider before entering into the LSR. The ideal LSR client is:

- Emotionally detached from the problem;
- Willing and able to handle legal paperwork;
- Able to gather and analyze financial information;

- Reasonably decisive;
- Willing and able to handle details and follow through with obligations;
- Able to find the time to perform the delegated tasks;
- Able to read and write (in an official language);
- Not suffering from emotional or mental disorders; and
- Self-motivated.

Clients who cannot understand the limits of the representation or who may not be able to perform delegated tasks are not appropriate candidates for the LSR.

Establishing the Retainer

New Rule 2.02(1.1) states:

2.02(1.1) Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent, and scope of the services that the lawyer can provide, and must confirm in writing to the client as soon as practicable what services will be provided.

The rule requires that the LSR must be confirmed in writing, though the commentary recognizes an exception if the client is receiving short term legal services or summary advice. The exception also applies if the lawyer is providing advice in an initial consultation prior to being retained.

The *Code* now provides the following guidance to lawyers entering into LSRs:

- The lawyer should explain the scope of the legal service and confirm the client’s acknowledgement and understanding of the risks and limitations of the LSR in writing;
- If a lawyer is providing advice based only on information provided by the client, the lawyer should qualify it by stating that it is based on limited information and may change with additional information (see commentary to Rule 2.01(2)). Without this qualification,

the client is not able to make an informed decision about whether to expand the retainer;

- The lawyer should clearly identify the tasks for which the lawyer and the client are each responsible and when the lawyer's services will be at an end;
- The lawyer should advise the client about related legal issues which fall outside the scope of the LSR and advise the client of the consequences of limiting the scope of the retainer. The client needs to have enough information on which to base a decision to limit or expand the retainer;
- A lawyer who is providing legal services under the LSR should not act in a way that suggests the lawyer is providing full services to the client. A lawyer should never do any work beyond the scope of the retainer without first reaching an agreement with the client about expanding the scope of work;
- Modifications to the scope of the LSR, or the respective obligations of the client and lawyer, should be confirmed in writing. The lawyer should confirm when the obligations under the LSR have been completed;
- A lawyer must not mislead a court or other tribunal about the scope of their retainer. Lawyers should consider whether disclosure of the limited nature of the retainer is required by the relevant rules; and
- When one party is receiving legal services pursuant to the LSR, the lawyers involved should consider how communications should be managed (see also Rule 6.02(8.1)).

In Alberta, Rule 2.27 of the *Rules of Court* requires a lawyer to inform the court if the lawyer is retained for a limited purpose. This rule allows lawyers to appear for a limited purpose without becoming solicitor of record.

Communication with the Opposing Party

The new Rule 6.02(8.1) clarifies when a lawyer may communicate directly with an opposing party who is self-represented for some matters but who has retained counsel for other aspects of a case. Where

notice of the LSR has been provided to a lawyer for an opposing party, the lawyer is required to communicate with the self-represented person's lawyer on matters related to the limited retainer. The lawyer may communicate directly with the opposing party on matters outside the LSR.

Clients may speak to one another directly without their lawyers. It is, however, unethical for a lawyer to provide their client with a scripted conversation which the client will then pursue with the opposing represented party in the absence of counsel.

If the LSR client does not wish to have documents served on their lawyer, there may be legitimate reasons for limiting the retainer in that regard and opposing counsel should be so informed. It is not appropriate, however, to use the LSR to allow the client to evade service or to allow a lawyer to avoid other obligations which are owing to the court.

Other Ethical Issues

American bar associations have debated whether lawyers should be allowed to "ghostwrite" pleadings without requiring the client to disclose the lawyer's involvement to the court. In Canada, we have not seriously contemplated restrictive ethical rules on ghostwriting. It encroaches on a client's confidentiality and privilege to force the disclosure of a lawyer's involvement if the client does not wish to make it known. It may also have a chilling effect on the willingness of lawyers to assist with document preparation.

A client who issues frivolous or misleading pleadings in their own name does so in their own name, not that of their lawyer. However, the lawyer has a duty to explain to the client the importance of complying with the court's rules.

The lawyer does not have a positive obligation to independently investigate facts put forward by the client unless the lawyer has reason to know or suspect that what the client is saying is false. A lawyer cannot assist the client in submitting false evidence to the court.

Liability Issues

One of the biggest reasons that lawyers are hesitant to adopt LSRs is the fear of liability. Claims may arise from failing to warn the client about the limits of the

retainer and the potential consequences of limiting the lawyer's involvement.

Liability issues may arise in a variety of situations. Some matters are too complex for LSRs. In other cases, the lawyer and the client do not have a shared understanding about who is responsible for particular tasks. Sometimes the lack of understanding goes to the heart of whether the retainer is full or limited in scope. Standard retainer agreements and checklists are essential for LSRs.

Lawyers should be proactive and ensure that the client is performing their tasks when the lawyer and client have intersecting roles. A client's failure to perform certain tasks may put the lawyer at risk.

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In the current legal environment, LSRs are likely to become more prevalent. While lawyers understand their ethical obligations to clients, they are often uncertain about how to effectively manage the LSR in practice. With a better understanding of ethical, practical, and procedural requirements, lawyers will become more comfortable offering services through the LSR.

LSRs are good news for lawyers. They create opportunities to serve clients who might not otherwise have consulted a lawyer. Lawyers are paid for their services when rendered, avoiding problems with receivables. In many cases, LSRs eventually become full retainers.

LSRs are also good for clients as they can control their legal matters and the associated costs. Clients are generally more satisfied with their interactions with lawyers. LSRs support clients' ability to remain autonomous while also receiving reliable legal advice and assistance when it is necessary to achieve an effective result.

There are many on-line materials and books dealing with LSRs. The ABA website has a number of useful publications for sale. The list below, though not exhaustive, identifies publications and resources to assist lawyers in providing limited scope services in a prudent and effective manner. ❁

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### Resources and Links

1. ABA Handbook on Limited Scope Legal Assistance (with appendix of resources) - [apps.americanbar.org/litigation/taskforces/modest/report.pdf](http://apps.americanbar.org/litigation/taskforces/modest/report.pdf).
2. ABA Journal, June 1, 2013 – “What ethics issues to consider when offering unbundled legal services: [http://www.abajournal.com/magazine/article/lawyers\\_offering\\_unbundled\\_legal\\_services\\_must\\_consider\\_the\\_ethics\\_issues/](http://www.abajournal.com/magazine/article/lawyers_offering_unbundled_legal_services_must_consider_the_ethics_issues/).”
3. ABA Resolution and Report, dated February 11, 2013 – available on [www.americanbar.org](http://www.americanbar.org).
4. LSBC - “Managing the Risk of a Limited Retainer”: <http://www.lawsociety.bc.ca/page.cfm?cid=1200>.
5. Unbundling 101 by Sue Talia, March 24, 2009 – available on [www.americanbar.org](http://www.americanbar.org).
6. Canadian Lawyer Magazine, June 2013 – “Lawyers Have Mixed Views on Unbundling”.
7. “Ghostwriting and the Invisible Lawyer”, Peter R Bornsten: Litigation, Volume 39, Number 3, Summer 2013 (ABA).
8. Law Times News, May 13, 2013: “Survey Shows Mixed Views on Unbundling” - <http://www.lawtimesnews.com/201305132823/focus-on/focus-survey-shows-mixed-views-on-unbundling>.
9. “Limited Scope Representation: CAFCA Guide” by K. Bird and D. Beach – available on [www.mobar.org](http://www.mobar.org).
10. LSUC Unbundling Discussion Paper - <http://www.lsuc.on.ca/unbundling/>.
11. Federation of Law Societies of Canada: Model Code of Professional Conduct - <http://www.flsc.ca/en/federation-model-code-of-professional-conduct/>.

*Nancy Carruthers graduated from the University of Saskatchewan law school in 1990. She then articulated at Parlee McLaws in Calgary and was called to the Alberta bar in 1991. Ms. Carruthers practiced as an associate and a partner in the litigation department at Parlee McLaws, focusing on insurance defense litigation. In February 2005, she joined the Law Society of Alberta as a Practice Advisor. The Practice Advisors' Office provides confidential ethical and practice advice to Alberta lawyers.*

# Limiting the Risks of Limited Scope Retainers

By Anne L. Kirker, QC,  
and Jennifer Blanchard



Anne L.  
Kirker, QC



Jennifer  
Blanchard

There is no doubt that limited scope retainers (“LSR”) are an innovative way to ensure access to legal services at a time of unprecedented demand. The *Law Society of Alberta Code of Conduct* has just been amended to include rules and commentary specifically related to LSRs. **However, these retainers also present some unique challenges from a risk management perspective and demand special attention by lawyers who provide professional services in this way.**

As a starting point, it is important to consider the following words of Justice Binnie, speaking for the majority of the Supreme Court of Canada in *3464920 Canada Inc v. Strother*:

When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement. The solicitor-client relationship thus created is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. ...The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency. Not every breach of the contract of retainer is a breach of fiduciary duty. On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for.<sup>1</sup>

In other words, simply documenting the LSR does not address all of the duties owed to a client. Solicitor-client relationships are fiduciary relationships in which: “the fiduciary undertakes to act in the

interests of the other party”.<sup>2</sup> Lawyers have in all cases an obligation to evaluate whether a proposed retainer is appropriate in the circumstances, having regard to the lawyer’s expertise, the complexity of the matter, and the client’s ability to understand the issues and instruct counsel. For example, even in a standard retainer situation, a lawyer must ensure that the client has sufficient understanding of the legal matter to competently give instructions: “[t]he key is whether the client has the ability to understand the information in relation to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision”.<sup>3</sup>

The new *Code of Conduct* reflects these obligations in the context of LSRs. Lawyers entering into such retainers must critically consider whether the matter is appropriate for a limited retainer.<sup>4</sup> If so, the lawyer must also be satisfied that the client fully understands the nature and scope of the retainer (i.e. the risks as well as the benefits)<sup>5</sup> and is capable of managing the tasks outside the scope of the lawyer’s limited retainer.<sup>6</sup> It is then important to document this agreement clearly and concisely and to carry out the LSR in a manner consistent with its limits.

**Think critically:** Not all matters, and not all clients, are suitable for LSRs. Consider limited retainers only in cases within your competence. A lawyer must fully understand what issues may arise and what steps may be required in order to assess whether the LSR is advisable and to explain to the client the potential consequences of limited representation. You cannot reasonably discharge your professional obligations if you lack familiarity with the subject matter.

Some matters may be too complex or technical for limited representation. If you conclude that the matter cannot be properly handled on a limited retainer basis and the client is not prepared to enter into a standard retainer, you must decline to act.<sup>8</sup>

**Communicate clearly:** It is of utmost importance to clearly explain the implications of the proposed LSR

<sup>1</sup> 2007 SCC 24, at para 34.

<sup>2</sup> *Galambos v. Perez*, 2009 SCC 48, at para 69.

<sup>3</sup> Code of Conduct, Commentary to Rule 2.02(12).

<sup>4</sup> Commentary to Rule 2.01(2).

<sup>5</sup> Rule 2.02(1.1) and Commentary.

<sup>6</sup> Rule 2.02(1.1) and Commentary.

<sup>7</sup> Commentary to Rule 2.02(1.1).

<sup>8</sup> Commentary to Rule 2.01(2).

to the client. The *Code of Conduct* not only requires that lawyers confirm, in writing, what legal services will be provided, but also that the client acknowledge and understand the risks of the limited retainer.<sup>9</sup> It is therefore necessary to explain precisely what you will do and, perhaps more importantly, what you will not do.

In *ABN Amro Bank of Canada v. Gowling, Strathy & Henderson*, the Court held:

Any attempt by a solicitor to limit his/her retainer to a scope less than required of a reasonably competent and diligent solicitor should be done in simple, concise and precise language reduced to writing. Any ambiguity in such communication, whether it be written or oral, should be resolved against the solicitor. To do otherwise is to leave a client without the quality of legal services he/she would otherwise be entitled to as matter of law and the freedom to retain and instruct another solicitor of choice so advised.<sup>10</sup>

The Ontario Court of Appeal recently reached a similar conclusion in *Outaouais Synergist Inc. v. Lang Michener LLP*. The matter involved a land purchase by a sophisticated client. After the purchase, the client learned that the lands were surrounded on three sides by a reserve in favour of the municipality. In the resulting professional negligence action, the law firm argued its retainer was limited to the conveyance of title and that the client had accepted responsibility for due diligence. The Court found no clear limitation of the retainer:

Legal matters relating to the title and to ingress and egress are not normally matters that are delegated to the client, at least not without a clear delineation of responsibilities by the lawyer, and the client's acceptance of those responsibilities; the lawyer has a duty to consult with the client 'on all questions of doubt which do not fall within the express or implied discretion left to him'.<sup>11</sup>

In contrast, in *Lerner v. Laufer*, the lawyer took care to explain and document what he would and would not do for the client. The client agreed to a limited retainer, which required the lawyer to review a matrimonial property settlement agreement which

the client and her husband had negotiated directly with the assistance of a family friend. In establishing the parameters of his retainer, the lawyer confirmed that he would review the agreement document, but would not review or verify the husband's income or the value of the matrimonial property. He also confirmed that he was not able to advise his client about the fairness of the negotiated settlement. After the settlement agreement had been executed, the client learned that her husband's income was greater than what she understood at the time she agreed to the deal. She sued the lawyer, alleging that he was negligent in failing to conduct adequate discovery and advise her against proceedings.

The Court observed that the State's rules specifically authorized lawyers to act on limited retainers with a client's informed consent and found that the nature and scope of the lawyer's retainer agreement was clear. The lawyer had *not* been retained to perform discovery or to provide advice about whether the settlement agreement was fair:

We hold it is not a breach of the standard of care for an attorney under a signed precisely drafted consent agreement to limit the scope of representation to not perform such services in the course of representing a matrimonial client that he or she might otherwise perform absent such a consent.<sup>12</sup>

The lawyer's obligation to think about the advisability of the LSR and to ensure the client is properly informed does not end with the execution of the limited retainer contract. The obligation is ongoing throughout the retainer. For example, in *Nichols v. Keller*,<sup>13</sup> the lawyer was retained to assist a client with a worker's compensation claim. The lawyer did not, however, advise the client about the possibility of a separate civil cause of action arising from the same incident. The limitation deadline for a tort claim was missed. The lawyer was sued and was ultimately held responsible for failing to advise the client about his legal rights arising outside of the scope of the lawyer's retainer which, the Court held, were "*reasonably apparent*". Notwithstanding that the lawyer had been retained to act only in relation to the worker's compensation claim, the solicitor-client relationship obligated him to ensure that the client was properly informed about all claims arising from the incident so as to make a decision about whether or not to pursue other remedies.

<sup>9</sup> Rule 2.02(1.1) and Commentary.

<sup>10</sup> (1994) 20 O.R. (3D) 779 (Ont. Ct. Gen. Div.), at para. 25.

<sup>11</sup> 2013 ONCA 526.

<sup>12</sup> 359 N.J. Super 201.

<sup>13</sup> 19 Cal.Rptr. 2d 601.

**Conduct yourself accordingly:** From a risk management perspective, it is also important to ensure that all of your actions are consistent with the LSR. Resist the urge to advise or assist the client on matters outside the scope of the limited retainer without documenting an amendment to the agreement signed by the client. Any work performed outside of the LSR undermines the agreement and exposes the lawyer to liability because it creates ambiguity, which will be interpreted against the lawyer. Report to the client when the tasks under the limited retainer have been completed. This is particularly important if the client's legal matter will continue after the lawyer's retainer has been concluded.

If the matter involves court appearances, ensure that the Court and opposing counsel also know about the nature of the LSR. Indeed, this is required by Rule 2.27 of the Alberta *Rules of Court* and may be accomplished either orally during a Court appearance or by filing the terms of the limited retainer in advance. Note that unless the Court has been specifically advised of a limited retainer, filing or serving any document with your name on it makes you the "Lawyer of Record" for the party for whom the document was filed. Do not inadvertently become the Lawyer of Record if this was not contemplated as part of your retainer.

Lawyers must also address how communications with adverse parties will be handled. The *Code of Conduct* makes it permissible for an opposing party's

lawyer to communicate directly with your limited-retainer client without your consent, unless you give notice to opposing counsel that communications should be confined between counsel as is normally the case.<sup>14</sup>

Alberta Practice Advisor Nancy Carruthers has prepared an article on the ethics of LSRs which is available on the Law Society of Alberta's website.<sup>15</sup> She points out that the American Bar Association's Standing Committee on the Delivery of Legal Services has developed an online resources centre with a wealth of information about best practices for lawyers to manage the risks of limited retainers.<sup>16</sup> While some of the centre's information is specific to meeting U.S. rules, much of the advice is readily applicable to Alberta lawyers considering these arrangements. There is also an excellent article that can be obtained from the Law Society of British Columbia website.<sup>17</sup> In addition, the Legal Education Society of Alberta is also addressing limited scope retainers in its "Law and Practice Update" course. Materials from LESA courses are available for purchase on its website.<sup>18</sup> ❁

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<sup>14</sup> Rule 6.02(8.1).

<sup>15</sup> [www.lawsociety.ab.ca](http://www.lawsociety.ab.ca) - The Advisory, Volume 10, Issues 1, January 2012.

<sup>16</sup> [www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html).

<sup>17</sup> [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca) - search for "Managing the Risks of a Limited Retainer".

<sup>18</sup> [www.lesaonline.org](http://www.lesaonline.org).

*Anne L. Kirker, QC, has practiced litigation and dispute resolution since 1992. She has expertise in handling complex commercial and professional liability matters, insurance coverage disputes, and class actions. She has acted as lead counsel at all levels of the courts, including the Court of Appeal of Alberta and the Supreme Court of Canada, and has represented clients in a number of alternative dispute resolution processes, including complex, multiparty negotiations. Ms. Kirker is a partner with Norton Rose Fulbright and was a member of the firm's Executive Committee from 2004 to 2010. In 2011, she was elected a Bencher (director) of the Law Society of Alberta. In 2012, she was honoured with a Queen's Counsel appointment. Ms. Kirker has been consistently recognized as one of the leading lawyers in Canada since 2006 in The Canadian Legal Lexpert Directory and was recently recognized as the Best Lawyers Lawyer of the Year in the area of Legal Malpractice.*

*Jennifer Blanchard is an associate in the litigation group at Norton Rose Fulbright Canada, having joined the former Macleod Dixon firm as an articling student after graduation from the University of Calgary in 2008. She practices primarily in the area of mortgage enforcement and debt collection, but her practice also includes builders' liens, construction litigation and insurance defence.*



# Best Practices in Limited Scope Retainers



Jeanette  
Fedorak, QC

Improving access to justice is an important goal of the legal profession and duty of its members. Limited scope retainers (also known as “unbundled services”, or “LSRs”), have been recognized as a way to facilitate access to justice for those who might not otherwise be able to afford legal assistance.<sup>1</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,<sup>2</sup> the percentage with limited resources is growing. The Vanier Institute has noted that the debt-to-income ratio after taxes has reached a new high. Court processes also take more time and resources than they did in the past.<sup>3</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>4</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>5</sup>

## Best Practices in Limited Scope Retainers

It is up to each lawyer to decide, as a matter of professional judgement, 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 in helping you assess the legal issues in the case, the client’s ability to self-represent, and your ability to work together with a client. Take advantage of existing resources to help this process, such as the checklists found at <http://www.texasatj.org/files/file/FLRRiskMgmt.pdf> and the checklists referred to Andrea Doyle and Jocelyn Hill’s article on use of limited scope for legal aid matters in Alberta (see page 38);

- **Ensure a clear mutual understanding of the scope of work.**

Limitations on scope must be informed and in writing. In the LSR agreement, clearly divide the work between that for which you will be responsible and that for which the client is responsible.<sup>6</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,

<sup>1</sup> Macfarlane, Dr. Julie, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (<http://www.representing-yourself.com/PDF/reportM15.pdf>).

<sup>2</sup> Vanier Institute of the Family, *The Current State of Canadian Family Finances - 2011-12 Report* by Roger Sauvé, (<http://www.vanierinstitute.ca/modules/news/newsitem.php?ItemId=421#.Uj5ItQu7X3Q.email>).

<sup>3</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>4</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>5</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>6</sup> Sample retainer agreements can be found at <http://www.texasatj.org/files/file/FLRiskMgmt.pdf> and <http://www.abanet.org/legalservices/delivery/delunbund.html>.

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 competent service is not relaxed in LSRs.

- **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 may otherwise 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 a tax matter, the LSR may not be appropriate.

However, before declining the LSR, keep in mind the general principle that some representation is generally better than no representation.

- **Does the client have realistic expectations?**

Be clear with your client that not only will the fees be limited in a LSR, 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 LSR. In addition, the client needs to be open to take advice and coaching from you about the legal system and possible outcomes. If you are concerned that the client won't be receptive to your advice and willing to rein in their expectations, the LSR 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. The failure of a client to be forthcoming is a risk when providing a traditional full service retainer, but even more so in the LSR 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 clients 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.

- **Do I need to disclose the LSR to the Court?**

There is no specific requirement in our *Rules of Court* for a lawyer who is merely advising a client or ghostwriting documents to disclose their role to the Court. 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. 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 personally file them, 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 the LSR, the lawyer must make this clear to the court.

Section 2.27 of the *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 LSR. 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 LSRs and full service representation. The exception to this is the provision of short-term legal services through a non-profit legal services provider.

- **How should communications with the other side be handled when the LSR is involved?**

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

*Thanks to Angela Croteau for her valuable input and assistance in updating this paper. The views expressed are those of the author, and do not necessarily reflect that of Alberta Justice and Solicitor General.*

*Jeanette Fedorak, QC graduated from the University of Alberta in 1981, and was admitted to the Alberta Bar in 1982. In 2012, she was appointed to Queen’s Counsel. Jeanette practiced with Alberta Justice from 1987 to 2012, and prior to that, worked in private practice, and as in-house counsel with an insurance company.*

# Getting the Public and the Profession on the Same Page About Unbundled Legal Services



Dr. Julie Macfarlane

### What the Public Wants

The 259 self-represented litigants (“SRLs”) in British Columbia, Alberta, and Ontario whom I interviewed in 2012 for my national study shed some interesting light on the question of lawyers offering assistance using limited scope retainers (“LSRs”).

The first reality my study exposes is that after a decade of Law Societies striking committees and task forces on LSRs, drafting new rules of professional conduct and getting their insurers on board recourse to LSRs is still rare because most lawyers will not offer services that way.

The second is that the public really wants to be able to buy legal services this way. While they are trying to do just that - they are, for the most part, striking out.

My 40 - 60 minute interviews with each respondent explored their experiences seeking and using the services of a lawyer as well as representing themselves. This was because an astonishing 53% of my respondents - all of whom were now representing themselves in either family or civil court - had at an earlier point retained counsel but had run out of money to pay their legal bills. 86% of these now “unrepresented” individuals continued to look for legal advice or assistance. This usually meant that they were looking for access to a pro bono or subsidized service (Legal Aid, duty counsel) or find a private lawyer who would “unbundle”.

While none of the SRL respondents in my study talked about “unbundling”, this is not a term that the public knows about, many described going systematically through the Yellow Pages and calling a dozen or more law offices. They would ask: “Will you assist me with my case by doing a specific task (most commonly reviewing documents or sometimes appearing for them in a hearing) and bill me only for the hours you spend?” To their amazement, almost no one said yes. They could not understand why a lawyer could not give them service on a piecemeal basis, like other professionals and trade. For the most part, those who did agree to the LSR were the

same lawyers they had previously retained and who had some familiarity with their case.

### What the Public Thinks

**The public cannot understand what our problem is - why wouldn't lawyers offer legal services on a limited scope basis? The refusal of lawyers to provide services through the LSR was met with bafflement by SRLs - why wouldn't lawyers take their money?**

My study also exposed a great deal of public frustration with the way that lawyers currently price their services and the information they offer to clients who want to make a sensible decision about what they can afford. Many SRLs wondered why some type of advance estimate of cost was not possible to enable them to make an appropriate decision as to whether to hire a lawyer:

“A mechanic will tell you how long it will take and about how much it will cost - a lawyer won't do that.”

Others complained about why it was necessary to be charged \$250 or more an hour for services that did not appear to require the skills and qualifications of a lawyer, such as form completion or the swearing of documents.

Most significantly, the SRLs expressed the sentiment that lawyers did not want to cede control of the file to clients. Many respondents said that their desire to be involved in decision-making, take on minor tasks that might reduce their overall costs, and stay in control of costs as they were expended was resisted by their lawyer. They were reacting to the “lawyer-in-charge” culture,<sup>1</sup> which is increasingly being rejected by 21st century clients who surf the Web looking for self-help and are far less deferential than their parents and grandparents towards professionals.

Large and growing numbers of Canadians will not and cannot pay for legal services in the traditional paradigm. As a result, more than 50% of litigants in many family courts are self-representing.<sup>2</sup> The public

<sup>1</sup> Macfarlane, J. *The New Lawyer: How Settlement is Transforming the Practice of Law* University of British Columbia, 2008.

cannot fathom why they should not be able to pay for services on an hourly basis and under their own direction.

**These restrictions - as the public sees them - feed into the perception that lawyers are determined to hew to a traditional model of authoritative adviser who should be trusted to spend the clients' funds wisely and as the substantive expert, assume control over the case. At best, some members of the public regard this as an outdated perspective on professional relationships in an Internet age. At worst, others see it as a power and money grab.**

### Why Can't Lawyers Offer Unbundling?

The reasonable reaction of a lawyer reading the above might be as follows:

1. Providing legal service is so much more difficult than the public appreciates - people do not understand the work that lawyers do because they are "non-lawyers";
2. The commitment of the profession to high-quality work is compromised by taking on work on a piecemeal basis. This is especially the case where the client does not fully understand the limits on the lawyer's responsibility in the LSR, and/or cannot complete their own tasks (the self-help element of the LSR) effectively;
3. If a "mistake" is made or the client is dissatisfied, they will bring a formal complaint or even sue for malpractice; and
4. Lawyers who have plenty of clients who are willing to retain them in the traditional paradigm have no incentive to use LSR's. Why fix a system which isn't broken?

The debate over unbundling has been characterized by these arguments. As a consequence, regulatory bodies across Canada that study unbundling and develop rules to permit LSRs have been unable to generate a legal culture that is receptive to the practice of offering unbundled services. Even a willingness by legal insurers to get involved has not made much of a dent in the overall anxiety level of the legal profession regarding LSRs.

### How to Respond to the Legal Profession's Fear of Unbundled Services.

1. It is correct that the public does not understand the work that lawyers do. Lawyers do a terrible job of explaining what services they provide. Lawyers should do a better job explaining what they do and should not shut down LSRs by saying "you, the public, just don't understand us."
2. Certainly, the work that a lawyer does when retained on the LSR is different from the work they do on a traditional retainer. It is limited in scope - that's the point.

This means there may be historical issues that the lawyer is unaware of or relationships that they know nothing about that bear on the outcome. Many SRLs in my study made the point that they knew more about their own case than their lawyer (of course!) and that the idea of briefing a lawyer on all this information served as a disincentive to hiring one.

It must be possible to come to a reasonable accommodation between lawyer and client. Lawyers need to get over their fetish about knowing "everything" about a case before being able to advise, negotiate, etc. The complexity of the law, especially the way that law has developed in the last 20 years, means that at best, a competent lawyer is giving their client an "educated guess", even where they are providing "full scope" services. Instead of focusing on the dangers of advising a client based on limited information, lawyers need to be realistic about just how rarely they ever give their client a completely reliable opinion. The LSR should, and can, focus on what the lawyer needs to know in order to provide the service they have been contracted to do.

Lawyers should also begin with an assumption that clients are intelligent enough to understand that lawyers can only deliver what they have been contracted to do. It is insulting for lawyers to tell the public that they cannot have the LSR because they cannot understand it.

This does not mean that every case is suited to the LSR, and there are some obvious warning signs. For example, if the client appears to have some serious mental health

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<sup>2</sup> Macfarlane, J. *Final Report of the National Self-Represented Litigants Study*, 2012. Available at [www.representing-yourself.com](http://www.representing-yourself.com).

issues or if there is an especially large volume of litigation material amassed to date. However, the principles that safeguard against these risks - clarity, talking it through and not just relying on paperwork, noting and addressing the warning signs of diminished lack of client understanding, continuing to be transparent about actual costs - are the same that any lawyer faces with any client.

It is also instructive to remind lawyers that their preoccupations as a profession are not necessarily the same as those of their clients. My study of SRLs as well as earlier research I have conducted<sup>3</sup> suggests that lawyers' preoccupations and anxieties such as collaborative lawyers who want to avoid trial at all costs, or lawyers offering LSRs obsessing over avoiding complaints from dissatisfied clients, may not be the same as their clients' preoccupations. Client priorities are getting value-for-money and effective movement towards resolution.

3. Law Societies do not currently collect information on whether complaints arise out of LSRs or traditional retainers, although this is currently being reviewed. Anecdotally, I have been told that LSRs generate no more, and possibly less, complaints than any other form of retainer agreement. The small number of SRLs in my study who found a lawyer willing to offer LSR services were delighted with the results. What is clear is that we do not have any empirical evidence to support the widely made claim that LSRs equal malpractice suits.
4. Sorry, but the traditional service delivery model is broken. Corporate clients are increasingly dissatisfied with the traditional paradigm for legal fees as well. Their version of voting with their feet is to hire in-house counsel, which is the fastest growing sector of the profession in both Canada and the US. If you need persuading, look at any issue of the American Bar Association's magazine.

It is true that the greatest demand for unbundled legal services comes from non-corporate clients. As a practical matter, the legal profession should continue to focus

on corporate clients who provide work for about 80% of lawyers. However, I and many others believe that the profession has a social responsibility to serve as many people as possible in a commercial model that makes sense for both lawyer and clients. The potential is there for the taking in the concept of unbundling. The justice system is paid for by the public and its users are entitled to receive value through innovations that reflect their needs.

## The Role of the Regulator

How can regulatory bodies which have influence, resources and expertise address the profession's fears about unbundling and at the same time offer the public what it wants?

1. Clarify that lawyers are not to be held responsible for policing the competence of their clients but that they are responsible for explaining their services to them.

Self-help is by definition stressful. My study showed that mistakes are made no matter the educational and professional background of the client (including lawyers who might often be SRLs under emotional pressure in their own cases).

Regulator practice advice should focus on ensuring that clients understand the LSR arrangement and help lawyers set out and manage those expectations. This is the approach taken by the collaborative law movement in the U.S. (see the ABA Model Rules). While not perfect, this approach enables rather than constrains important new approaches to the model for offering legal services.

2. Provide clear direction that if a client wants the LSR, they should be able to negotiate one. Practical advice and rules of professional conduct should not discourage unbundling. Offer lawyers some realistic ways of assessing dangers in this and any other file.
3. Provide training for new and not-so-new practitioners on how to contract for limited services. Unless they are one of the small number who have informally experimented with this model for years, lawyers do not presently have the tools to introduce unbundling into their practice in a systemic way. CLE programming and law school

<sup>3</sup> For example, Macfarlane, J. *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* Department of Justice, Canada 2005. [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005\\_1/index.html#a01](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/index.html#a01).

curricula should include sessions about alternative business arrangements including but not limited to LSRs. The regulator could provide a model retainer agreement and develop checklists for questions to ask when contracting for the LSR. This training should focus on how to set and manage client expectations - a crucial challenge for all lawyers, not only those using LSRs.

4. Take leadership. Lawyers look to their regulatory bodies to give them direction, especially in times of change. If the public is to access the legal services they say they want and need, lawyers require proper advice, direction, and support from their regulator.

**Regulatory bodies can lead this initiative in the public interest by mediating between the concerns of their members and the expressed needs of the public. This means promoting, not just permitting, via education and open debate, the use of LSRs. Then we shall have a profession that is listening to the public. ❁**

*Dr. Julie Macfarlane, Project Director, is Professor at the Faculty of Law of the University of Windsor as well as Professor of Practice at the Kroc Institute for International Peace Studies at the University of Notre Dame. Dr. Macfarlane has researched and written extensively on dispute resolution and in particular the role of lawyers (for example her best-selling 2008 book *The New Lawyer : How Settlement is Transforming the Practice of Law*). She became interested in learning more about the personal experiences of self-represented litigants as they become an increasingly significant interest group in the justice system, leading to the National Self-Represented Litigants Research Study (2013). Dr. Macfarlane is an experienced mediator, facilitator and conflict resolution educator who is committed to access to justice and the modernization of the justice system.*

## Perspective From the Bench



Mr. Justice  
R.A. Jerke

A properly functioning justice system is a core value in our democratic society. The system is complex and citizens make contact with it in numerous ways.

**A big challenge is the ability of individuals to enforce or defend legal rights in an effective and meaningful way**

**regardless of economic status. The problem is sometimes referred to as an “access to justice” issue. Access to justice is critical to ensure public confidence in our justice system.**

One approach, which can support more effective and meaningful access, is to “unbundle legal services”. This is when clients have lawyers perform discrete, defined tasks. In our Court, we are seeing lawyers performing discrete tasks in many circumstances. Here are some examples:

- Drafting pleadings;
- Giving independent legal advice in divorce settlements;
- Providing opinions in estate matters on issues such as family relief;
- Acting as duty counsel for criminal appearances and family law chambers;
- Preparing chambers applications and supporting materials;
- Arguing chambers applications;
- Preparing briefs for Judicial Settlement Conferences (JDRs);
- Attending JDRs; and
- Cross-examining certain witnesses (s.486.3 *Criminal Code*).

The rules contemplate that litigants may retain a lawyer for a particular purpose (r.2.27). The lawyer must inform the Court of the limited nature of the appearance orally at the time of the appearance, or in writing prior to the appearance. Although there are

so far no reported decisions on this rule, judges are alive to the changes in the rules, the nature of limited scope retainers, and the modern reality of evolving solicitor-client retainers. Lawyers need not be overly fearful that a Court may conscript them into a full-retainer relationship where the limitation of their scope has been made clear to the bench and opposing counsel.

My own experience is that the involvement of lawyers for a particular purpose focuses litigants on the real problem at hand, helps to address specific legal points, provides a more realistic legal analysis, and assists in identifying the questions the Court needs to answer. The system benefits from increased efficiency and reduced staff resources. Judges are faced with fewer but more serious issues. Litigants can more easily see how the adjudication process works, and that the process is far for them.

Concerns are sometimes expressed that by providing clients with discrete task services, lawyers are merely arming folks who then become even more enmeshed in the litigation process. With respect, it seems to me that ship sailed with the advent of the internet and social networking. People are easily able to access information about the law or at least some perspective on it. Not all such perspectives are helpful. Take, for example, the bizarre stance adopted by folks who claim to be “Freemen on the Land”, or the many files for which resolution becomes stalled because of repeated filings over the same issue by self-represented litigants.

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Without doubt, limited scope legal services are not the only answer to access to justice concerns. Nor is every case suitable to unbundling. Lawyers need to make careful decisions about which cases work, knowing that Courts place considerable reliance on their work and contribution to the administration of justice. That said, lawyers should not assume that Courts are naïve or resistant to the provision of legal services to the public in this way. ❁

The Honourable Rodney A. Jerke was admitted to the Bar of Alberta in 1980, and appointed Queen's Counsel in 1998. Prior to being appointed to the Court of Queen's Bench, Mr. Justice Jerke was an associate and a partner with Davidson & Williams LLP in Lethbridge since 1981, with his main area of practice being civil litigation. He was a Bencher for the Law Society of Alberta from 2004 to 2010; President of Pro Bono Law Alberta from 2007 to 2009; and President of the Law Society of Alberta from 2010 to 2011. Mr. Justice Jerke is also a board member and committee chair of the Lethbridge Regional Hospital Foundation, the Lethbridge and District United Way, the Victorian Order of Nurses, and the Rotary Club of Lethbridge. He was appointed to the Court of Queen's Bench by the Honourable Rob Nicholson, QC, in 2011.

Coming to a Courtroom Near You



Marie L.
Gordon, QC

This paper offers a brief discussion on the topic of “Limited Scope Retainers” or “Unbundled Legal Services” in the family law context. While counsel appearing before members of the Court of Queen’s Bench have frequently only been there for a part of a family law file, it is only now that a formalised understanding of a true “Limited Scope Retainer” (“LSR”) practice is emerging.

When I first heard the notion of “unbundling”, I was (a) suspicious, (b) disinterested, and (c) not a fan of the idea. As someone who started her family law practice in the early 1980s, I was schooled in the idea of lawyering as a committed and long-term relationship between lawyer and client.

As a lawyer, I would stay “on board” for the long haul, seeing a client through to trial if necessary. It even felt somewhat disloyal to refer my client to new counsel for the conduct of an appeal. This “all-or-nothing” or “cradle-to-grave” representation was the norm. This image of devoted legal representation of course ignored the reality of those cases over my professional life where

- I fired the client;
- the client fired me;
- the client came to me for representation after bungling their first court application, hoping I would help them settle the file;
- the client came to me after a trial date was set, asking me to represent them for the purposes of a trial; and
- later on in my career, I decided to only take on collaborative family law files.

Limited scope representation also exists in many other forms, including Court of Queen’s Bench Duty Counsel for Family Law Chambers, assisting the Court and self-represented individuals navigate morning Chambers, and Emergency Protection Orders applications.

“Unbundling” and limited scope representation are concepts that are frequently used interchangeably. In a recent report by the Law Society of Upper Canada,¹ the following definition was offered:

Unbundling of legal services refers to the provision of limited legal services or limited legal representation. It is the concept of taking a legal matter apart into discrete tasks and having a lawyer or paralegal provide limited legal services or limited legal representation, that is, legal services for part, but not all, of a client’s legal matter by agreement with the client. Otherwise, the client is self-represented. Some common services involve lawyers or paralegals:

1. Providing confidential drafting assistance;
2. Making limited appearances in court as a part of the limited scope retainer;
3. Providing legal information and advice under a limited scope retainer; and
4. Providing legal services at a court-annexed program, or through a non-profit legal service program.

This is a very different paradigm than the traditional retainer, where it is clearly understood that the lawyer handles the entire file from start to finish. It is the lawyer who sets the litigation strategy and obtains instructions from the client to pursue that strategy. The client’s involvement is usually limited to providing information and facts, signing Affidavits, authorising settlement proposals, paying the lawyer’s fees and attending in court (sometimes) to watch the process unfold.

¹ “‘Unbundling’ of Legal Services and Limited Legal Representation: Background Information and Proposed Amendments to Professional Conduct Rules,” Law Society of Upper Canada, October 2010 (<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147483764>).

In contrast to this traditional client role of limited involvement, the LSR model anticipates that together, client and lawyer choose the services that the lawyer will provide, and both parties have a clear understanding of the boundaries around what the lawyer will do and will not do for the client.

What are some factors driving a rise in LSRs? Some of the factors include:

- **Financial concerns:**

Full legal representation is simply beyond the financial means of most family law litigants. High hourly rates, large retainers, and the inability to control the costs of litigation are huge factors for many people undergoing separation and divorce. The 2010 Canadian Lawyer Magazine Survey (Western Region) estimates that the cost of an average contested divorce is \$14,769.00 up to a maximum of \$64,717.00. The cost of negotiating and coming to an average child custody, child support, and spousal support agreement is an average of \$3,194.00, up to a maximum of \$7,768.00. People are saving thousands by representing themselves. Furthermore, Legal Aid coverage has traditionally only been available to very low income individuals and the eligibility guidelines have been more restrictively redrawn in 2010 in Alberta. The working poor and middle class frequently have no option but to represent themselves.

- **Self-help litigation culture:**

Court forms are user-friendly and forms are available and downloadable from the internet. Judges and court administration systems have, for the last decade, provided an environment that is much more user-friendly and accessible for self-litigants. Legal advice, which was once only available in a lawyer's office, is now readily available (in varying degrees of accuracy and helpfulness) on the internet. Individuals are much less intimidated by the prospect of representing themselves.

- **Consumer dissatisfaction:**

Many individuals who might actually be able to afford a full scope retainer nonetheless choose to represent themselves, either because they wish to resolve matters on their own and (accurately

or not) are of the view that they don't need someone else's help to effectively resolve the matter.³ Some litigants feel that having a lawyer will not improve their case.

- **The erosion of the middle class:**

Demographers note shifts in income/asset levels resulting in an erosion of the traditional middle class population with a greater spread between very low income individuals and affluent individuals able to afford full scope retainers.

What's in it for Lawyers?

As most members of the Alberta Bench know, there is currently a crisis in the availability of family law counsel. The reasons for this access crisis are unclear, but the problem is a real one for many family litigants.

However, in other jurisdictions such as California, unbundling actually represents an effective niche marketing tool for family lawyers who are interested in expanding their practice. According to Sue Talia, the LSR represents an untapped market for lawyers looking for work. While this is not currently a relevant consideration for most family lawyers practicing in Alberta who have more work than they can handle and who do not need to market or attract new business, (and, as a result, LSR practice may not expand here as quickly as it might in other jurisdictions), it might well be in the future.

However, there are a number of other reasons why the LSR practice is attractive to family law practitioners. These are some of the reasons why:

- **Much less stressful.**

To take on a discrete task or set of tasks on a file rather than the whole retainer allows a lawyer to control the amount of stress they assume in representing a client.

- **"I hate Court."**

Some family lawyers are happy to work behind the scenes assisting in negotiations, providing advice on strategy, offering legal research, or in assisting a client prepare for Court, and do not wish to be active family law litigators.

³ Frequently, either in morning Chambers or in Special Chambers, an application is heard which may set support for a parenting arrangement allowing for a resolution of the matter rather than it proceeding to trial.

- **The ability to work part-time.**

It's almost impossible to be a traditional family lawyer, doing court work, on a part-time basis. There are many lawyers who simply leave practice because of the all-or-nothing approach. The idea of being able to practice on a part-time basis with a reduced overhead, without a full-time legal assistant, and with the ability to control one's agenda, is extremely attractive for a demographic slice of lawyers whose talent and energy to do family law may remain untapped without alternatives to full-time practice. Specifically, mothers on maternity leave, parents of small children, or lawyers who are interested in reducing their practice or semi-retiring are all likely candidates for a successful LSR practice. The idea of capturing more lawyers into this practice and expanding the consumer options available to clients may well be a win-win arrangement.

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**The introduction of the LSR practice in our courts is part of a larger paradigm shift in practice. As with the introduction of collaborative family law, fears and suspicions about a reduction in ethical standards were inevitable in the beginning, but unfounded in the end. I am actually hopeful that LSRs may meet some of the interests of clients, lawyers, and the Bench. Probably the most important point to make is that LSRs do not import a lower standard of competence or professional conduct than the full scope retainer.**

It goes without saying that the Court is exposed on a daily basis to full scope retainers where there is a

less than perfect lawyer/client relationship and with deficits in the competence of counsel.

In some ways, this is an "access to justice" issue as much as anything. Access to justice is about more than a self-litigant standing up in Chambers and being able to argue their own application, however ineptly. The help of a family lawyer to assist with even part of a file may be invaluable to some litigants unable to pay for a full scope retainer. As the Canadian Judicial Counsel suggests:

Equal access to justice depends on awareness of procedural and substantive law; thus, representation by qualified counsel is virtually indispensable. The fact that more and more litigants are choosing to represent themselves in court means that judges and courts face new challenges in the fair, timely, and efficient delivery of justice. Even the simplest of court procedures can be overwhelming for the non-specialist. Self represented litigants are often unaware of their rights and the consequences of legal decisions.<sup>4</sup>

It is clear that this topic is a "work in progress", and that developments in all provinces across Canada will hopefully result in enhanced and more effective representation of clients who need access to lawyers. As Bertrand Russell said: "In all affairs, it's a healthy thing now and then to hang a question mark on the things you have long taken for granted."<sup>5</sup> ❁

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<sup>4</sup> Canadian Judicial Counsel, 2004-2005 Annual Report at p.20.

<sup>5</sup> *Supra*, note 4 at p.17.

*Marie L. Gordon, QC, is a family law practitioner with the firm of Gordon Zwaenepoel Barristers and Solicitors in Edmonton, having practiced with the firm since 1983. She currently focuses on Collaborative Family Law. Ms. Gordon teaches two courses in family law to students at the University of Alberta as a sessional instructor, and writes and presents papers on family law topics. Ms. Gordon is an associate editor of the Reports of Family Law, and sits on the Editorial Board of the Canadian Family Law Quarterly. She is a co-chair of the National Family Law Program, and a board member of the Canadian Research Institute on Law and the Family. Ms. Gordon has been named in the Canadian "Best Lawyers" directory since 2006, and was named as Edmonton's "Lawyer of the Year" in Family Law for 2013 by the Best Lawyers website.*

# Limited Scope Retainers in a Small Practice

By Edward Gallagher



Edward  
Gallagher

My law firm is a small firm located in Onoway, Alberta, about an hour's drive west of Edmonton. We have two lawyers, one articling student, and three support staff. We practice in the areas of real estate, wills and estates, family law, small business law, and some civil litigation.

We implemented our own version of Limited Scope Retainers (“LSR”) in November, 2009. We did so from scratch as there was very little practical guidance available to us. **With four years of experience in this area to date, we think that it has been a major success for us. We would not go back to the traditional lawyer-client relationship.**

My aim in this short article is to discuss the feasibility and mechanics of the LSR in a small firm environment.

## How We See “Limited Scope” Legal Services

To us, “limited scope” legal services is wider than just “unbundling”, which is the focus of recent regulatory efforts in Alberta and other Canadian and international jurisdictions. These define limited scope legal services as some variation of the following: “providing legal services for part, but not all, of a client’s legal matter, by agreement with the client”. (See the definitions in the *Code of Conduct* for lawyers in Ontario<sup>1</sup> and BC.<sup>2</sup>)

We view limited scope legal services as those involving anything less than “full scope” legal services found in a traditional lawyer-client relationship.

## Why We Choose to Use Limited Scope Retainers

We originally chose to use LSRs for the following reasons:

- **Efficiency**

We wanted a more efficient method for planning and delivering our work in a manner that clients could understand and track; and

- **Profit**

We had (and still have) an intense dislike of cost-plus hourly billing as a model for law firm pricing. LSRs provide an opportunity for pricing based on value of the services being rendered, rather than time.

## How Much Do We Use Limited Scope Retainers, and What Are They Suitable For?

We believe that LSRs are suitable for all types of client matters. This is not the same as saying that all LSRs are the same. They are not.

We use LSRs in one form or another for all legal services that we provide. We deliver our limited scope legal services in several ways:

- **Transactional Matters.** For real estate transactions and simple estate planning which we provide on a standard fixed fee, we set the scope of the legal services we provide.
- **Complex and Contentious Matters.** For all complex and contentious legal matters (for example, family law matters, and estate administration cases), we use one of the following approaches:

**Included/Excluded Approach.** We use this method which many other lawyers use as well, for non-contentious estate administration matters. All applicable “core legal services” are provided at one fixed price. Non-core legal services, and non-legal services that the Executor would normally provide (for example, preparation of financial statements) are extra, and are priced separately. This method is also suitable for other non-contentious matters such as purchasing/selling a small business.

**Incremental/Segmented Approach.** We use this method for contentious legal matters, except for those provided on an “unbundled” basis. Essentially, we provide the client with an overall plan for moving the matter forward to resolution. The plan is moved forward incrementally by stages or segments as the matter develops, using an initial Scope of Work and successive Change Orders.

<sup>1</sup> The Law Society of Upper Canada, *Rules of Professional Conduct* (<http://www.lsuc.on.ca/with.aspx?id=671>).

<sup>2</sup> The Law Society of British Columbia, *Code of Professional Conduct for BC* (<http://www.lawsociety.bc.ca/page.cfm?cid=2636&t=Chapter-1-%E2%80%93-Interpretation-and-Definitions>).

**Unbundled Approach.** This approach has the lawyer providing only certain specified legal services to the client, but it is the client who remains primarily responsible for his or her own matter. We use this approach when assisting clients with civil claims within the monetary jurisdiction of the Provincial Court so that their expenditure on legal services can better match the size of the claim. We use this approach in only a small minority of our overall number of cases.

## How to Limit Scope Effectively

To limit scope effectively, you must do three things:

1. Understand the client's goal in dealing with the legal problem presented;
2. Have a plan for the resolution of the legal problem so as to achieve the client's goal; and
3. Break down the work to be done in executing the plan into a series of discrete tasks.

The client's goal in dealing with their legal problem is fundamental because it provides the context within which the client will evaluate the lawyer's plan and how the lawyer executes the plan. Of course, clients may start with unrealistic or inappropriate goals. As lawyers, we have an opportunity to shape or influence the client's goals if they are not realistic or appropriate at the outset. If the client and lawyer cannot settle on an appropriate goal, the retainer should not proceed.

How can a lawyer advance the client's goal? This is what the plan is for. Clients generally want to be more involved in the active management of their matter than in the past. This does not mean that they should be dictating the lawyer's approach on how to resolve the matter. But it is important that the lawyer actually have a plan for dealing with their client's legal problem. Planning ability has not been considered part of the lawyer's essential skill set until relatively recently. Fortunately, in recent years the concept of "project management" (common in some other professional disciplines such as engineering) has become more mainstream for lawyers as well. There are plenty of resources available to the lawyer interested in sharpening this skill.

When the general plan is in place, the lawyer can "scope" the work. This involves identifying all of the specific tasks necessary to be done in order for the plan to unfold in the matter you want it to. It also

means discarding any potential task that does not positively contribute to the successful execution of the plan. Generality is the enemy here: the lawyer must be very specific in identifying a task and it must be made obvious to the client how each individual task fits into the overall plan.

A good plan, properly scoped out, allows the lawyer to maintain positive control over how the matter develops so as to achieve the client's aim in the manner desired. When the client sees, in writing, the number and range of tasks necessary to advance his or her matter, the work sells itself and agreement on the price is not generally a difficult matter.

## Client Response

In four years of using LSRs, we have found that clients much prefer this approach to the cost-plus hourly billing model. Clients like to know that we have a plan that we can explain to them and that they can understand. They also appreciate knowing the price of our services up front.

It is important to note that the overall price for our services is not necessarily less than would be the case on an hourly basis. What the client appreciates is knowing what the price actually is, before the services are rendered.

Clients are sometimes dissuaded by the price - it is too expensive. When this occurs, there are two basic options:

- Client and lawyer work together to reduce the price by removing certain tasks from the scope of work. The client pays less but the quantity of legal services is also reduced. This is consistent with our view of the value of the legal services we provide; or
- Agreement is not reached, and no work (or, in the context of an ongoing legal matter, no further work) is performed. Even this is a desirable outcome since it avoids the problem of doing legal work on the basis of what the lawyer thinks should be done only to later face a dispute with the client when the lawyer's account is issued. As the saying goes, "it is better not to get paid for the work you don't do, than not to get paid for the work that you do".

## Challenges in Providing Limited Scope Legal Services

Not everything involving LSRs is happiness and joy. Here are some of the challenges that we have faced in developing our system:

- **Poor task description.** A task needs to be described so that it is easy to determine when it starts, and when it has been completed. When in doubt, break a task down into its smallest components. For example, the task of sending a settlement offer to the other side in a litigation matter is really several tasks:
  - Preparing a draft settlement offer;
  - Sending the draft to your client for his or her review and comment;
  - Responding to the client's comments, where necessary;
  - Incorporating the client's comments (where appropriate) into the draft;
  - Sending the finalized settlement offer to opposing counsel and a copy to the client for his or her records; and
  - Advising the client of the response received, if any, within the time period given for a response, and the appropriate next steps.
- **Scope "creep".** This refers to the tendency for clients to request something additional beyond the specified scope of work and the lawyer providing the additional work without applying an additional price for that work. The extra work may not be much, but when it is permitted, the client is getting something for nothing, and this undermines the integrity of the pricing of legal services.
- **Reaction time to new events.** Normally, the client can be alerted to the possibility of new events emerging that are not reflected in the existing scope of work. For example, in a litigation matter, a court application may emerge without advance warning. Such events should not come as a surprise to the lawyer and the client since unforeseen applications often occur in litigation. However, because it occurs at a time that is not of your own choosing, you will have to revise the plan to take account of this development without delay. This takes time away from your other priorities with respect to this particular matter, and more generally in your practice.

## What We Like About Limited Scope Retainers

As a firm, we find that the LSR brings us several benefits:

- Our work is more focused because we are mindful at all times of progressing the matter in accordance with the client's goal, the lawyer's plan, and the detailed scope of work;
- Our work is easier to organize and manage because we know what needs to be done next in every matter;
- We can take a "team" approach to our work. We allocate work to the best person for the task: lawyer, articling student, or support staff member;
- Time spent on a task is no longer a measure of the lawyer's worth. Our goal is not to maximize billable hours, but to complete tasks on time and within budget. We are rewarded by greater efficiency, not penalized as we would be under the billable hour model; and
- We are more fulfilled in our work, because we are not slaves to the artificiality of the "billable hour". It simply does not matter how many one-tenths of an hour we work on a case.

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Overall, our experience with LSRs has been very positive. Although there are a few challenging aspects to this approach to the delivery of legal services, it has, on balance, been a net benefit to our firm. We see it as a distinct competitive advantage, and professionally satisfying.

Tellingly, the clients who like it the best are those who have dealt with lawyers on the traditional "full scope" retainer model where they never know what the price of the service would be until after the services have been provided. These clients prefer knowing ahead of time how we will help them, and what price they will have to pay.

It is a system that works. ❁

*Edward Gallagher started his working life by joining the Canadian Armed Forces for full-time service at age 17. Serving first in the infantry, he was then sent to law school at the University of Toronto. He completed his last 10 years of military service as a lawyer with the office of the Judge Advocate General. He has been in private practice since 2002, and writes and presents regularly on law office technology and practice management topics. He provides pro bono legal services to World War II and Korean War veterans in his community.*

# AVOIDING HANDCUFFS FOR YOU AND YOUR CLIENTS

## Limited Scope Retainers in Criminal Law

By Michael Bates & Jennifer Ruttan



Michael Bates



Jennifer Ruttan

Criminal law has always been unique in its substance and procedure and the issues that arise for the Limited Scope Retainer (“LSR”) are no exception. LSRs in criminal law have constitutional and statutory dynamics that require even greater care and consideration from lawyers before they agree to provide limited assistance to a client. **In the final analysis, a lawyer’s freedom to accept the LSR or to maintain a limited scope of involvement in a case may be required to yield to the liberty interest of the client. By being aware of the unique aspects of criminal law and ensuring a fully informed**

**client, counsel can avoid getting caught in the LSR problem.**

### The LSR Currently in Practice: Right to Counsel

The *Canadian Charter of Rights and Freedoms* enshrines the LSR in the section 10(b) right to counsel. The Supreme Court of Canada has ruled on the right of the accused to “retain and instruct counsel without delay” as being limited to an initial consultation prior to the commencement of the pending interrogation of the accused.<sup>1</sup> As such, any lawyer who takes a call for initial legal advice from a person in custody must be aware that it may be the only legal advice that person will ever get prior to being interrogated for hours by expert investigators (who have the benefit of legal advice whenever they want it).

In many cases, the entire section 10(b) retainer will be concluded at the end of a single phone call and the client should be made aware of this fact. Regardless of what the client wants, the criminal law dictates a form of LSR for initial legal advice on arrest or detention, so the lawyer must be very careful not to

limit these discussions without adequately seeking full instructions from the client.<sup>2</sup>

### The LSR Already in Practice: Assignment of Counsel

There are a number of provisions in the *Criminal Code* that speak to the assignment of counsel to the accused, some of which may be, but are not necessarily, in the nature of the LSR. **It is fundamentally important in any of these situations to have clear written correspondence and instructions confirming both what you are doing and what you are not doing in assisting the accused to make full answer and defence.**

For example, sections 684 and 694.1 of the *Criminal Code* allow for counsel to be assigned at “any time” for “an appeal or to proceedings preliminary or incidental to an appeal” where it is in the interests of justice for the accused to have legal assistance but the accused cannot afford to hire a lawyer. In many cases, the lawyer may be assigned the appeal in its entirety but there are many preliminary or interlocutory applications in the appellate context (such as leave to appeal or to introduce fresh evidence) that may be well-suited to the LSR.

Section 672.24 of the *Criminal Code* directs that the court shall order that a self-represented accused be represented by counsel where there are reasonable grounds to believe that the accused is unfit to stand trial. Due to the sometimes transient nature of “fitness”, counsel appointed under this section could ultimately play only a limited role in the proceedings.

As an example of a true statute-minded LSR, section 486.3 of the *Criminal Code* provides for counsel to be appointed for the purpose of cross-examining a witness because the self-represented is precluded from doing so. Typically, these cases involve the

<sup>1</sup> *R. v. Sinclair*, 2010 SCC 35.

<sup>2</sup> Consider, for example, that outside of the right to silence, judicial interim release or *habeas corpus* pursuant to s. 10(c) of the *Charter*, a client may have other legal issues to address that relate to her detention such as securing alibi evidence or identifying witnesses. A simple practice of asking, “Is there anything else I might be able to help you with?” before hanging up the phone is highly recommended.



cross-examining of minors or alleged victims of sexual assault or criminal harassment, although the categories remain open under section 486.3(2).

What is unique and potentially problematic in these situations is the fact that a lawyer may be required to offer services on the basis of the LSR in circumstances where such a retainer is being imposed on the client against their wishes. The vast majority of LSRs will be sought out by the client, but for cases where there is an appointment of counsel pursuant to the *Criminal Code*, counsel may also have to deal with serious friction from an uncooperative accused person.

The Supreme Court of Canada recently addressed the importance of, and concerns related to, the appointment of counsel as *amicus curiae* in contrast to the appointment of defence counsel. The court made note of the accused person's otherwise constitutional protected right to represent themselves and warned courts and counsel not to confuse the "friend of the court" with counsel for the accused.<sup>3</sup> This distinction further emphasizes the need for clarity in any decision to act on a criminal law LSR.

### **Limits on Counsel's Withdrawal**

Criminal law has developed unique obligations which a lawyer owes to the court and to the administration of justice more generally, that may preclude a lawyer from withdrawing from the record due to the inability of an accused person to pay legal fees.

A lawyer who comes "on the record" for an accused person is considered to be acting as counsel through to the completion of a trial unless a contradictory indication is made to the court. For example, in an indictable matter, it has become common practice for defence counsel to enter into the LSR with then expires at the end of the preliminary inquiry. Here, the lawyer advises the court that their retainer has expired. If the client is committed to stand trial, a lawyer who has made such a statement on the record is not further committed as trial counsel unless a further retainer is engaged.

Where no LSR is communicated to the court, a lawyer's request to withdraw as counsel of record

<sup>3</sup> *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43.

may be refused where there is no ethical bar to further representation. For example, Jennie Cunningham was essentially forced to act as trial counsel for free because the interests of justice required her withdrawal application to be denied even though as counsel she had no control over a client's loss of Legal Aid coverage and her application to withdraw was made as soon as possible.<sup>4</sup>

### **The Right to a Fair Trial: Could the LSR Do Harm?**

Another constitutional aspect that must be considered when contemplating a criminal law LSR is that an accused has a section 7 and 11(d) Charter-protected rights to a fair trial. As a result, the trial judge is under an obligation to provide a certain level of assistance to a self-represented accused. While it is clear that the court is not to step into the role of defence counsel in giving guidance and ensuring an accused person is able to bring out his defence in full force and effect,<sup>5</sup> it is unclear how, if at all, a trial judge will adjust their practice in circumstances where counsel participates in the LSR. Legally, there may be no distinction to be made whether the accused is self-represented, fully represented, or anything in between. In practical terms however, a trial judge may feel less obligated to assist an accused who is known to have access to counsel, even if only through the LSR.

### **Opportunities and Challenges for a Criminal Law LSR**

An accused person will generally seek services under the LSR for two reasons: (1) they cannot afford the services under a full retainer; or (2) they wish to represent themselves but require the knowledge and skill of a lawyer for particular aspects of their case. Where, for most aspects of the proceedings, an accused person wishes to be self-represented, the LSR may facilitate them in making full answer and defence by arming them with legal knowledge, opinion or advocacy on select issues.

<sup>4</sup> *R. v. Cunningham*, 2010 SCC 10. Note also that in discussing the "duty of commitment" in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, the Court made findings that would apply in the criminal context to the effect that lawyers owe a duty not to undermine the client's cause by withdrawing as counsel - subject to the concept of a limited scope retainer.

<sup>5</sup> See *R. v. Rain*, 1998 ABCA 315 for discussion of the obligations of the trial judge to ensure a fair trial "[W]hether an accused is represented by counsel or not..."

However, many clients seek services under the LSR because they do not have sufficient funds for a full retainer. Due to the significant state-funded infrastructure and enhanced rights to counsel in criminal law matters, a lawyer must only enter into the LSR after informing the client of other possible avenues for full representation.

#### **a. Legal Aid and Not-For-Profit Organizations**

Legal Aid, university student legal services, and other not-for profit organizations provide avenues for clients with limited financial resources to benefit from full scope legal services. Where a client seeks the LSR with a lawyer because of financial constraints, it is important to ensure the client understands the availability of other resources. The lawyer ought to assist the client in gathering information about these options before agreeing to enter into the LSR.

However, the low-income guidelines for Legal Aid and other organizations create a category of people who do not qualify for Legal Aid or other assistance but cannot afford a full service retainer. For accused persons within this category, LSRs may provide the assistance required to navigate the complex judicial system.

#### **b. Duty Counsel**

The combination of either pro bono or LSR services with duty counsel may assist a client understand the legal issues and legal system. For example, the retainer which is limited to a review of disclosure and for the giving of a legal opinion on the existence and merits of defences may provide the necessary service which duty counsel cannot perform because of their programme constraints. However, based on the information obtained through the LSR, if the accused person decides that he or she wishes to enter a guilty plea, duty counsel may be able to facilitate their subsequent in-court representation.

#### **c. Applications for Court-Ordered State Funding**

An application for court-ordered state funding should be considered when a client has a matter that involves complex legal issues and for a client who does not have sufficient financial resources to engage in a full retainer. These applications

are commonly referred to as Rowbotham applications.<sup>6</sup> There is no right for state-funded counsel for an indigent accused. The client must establish their rights under ss. 7 and 11(d) of the Charter would be infringed if the application is not granted by demonstrating that they: (1) do not have the financial resources to retain a lawyer; (2) have been denied Legal Aid coverage and exhausted all avenues of appeal; and (3) is not capable of competently defending herself without the assistance of legal counsel. These applications require evidence regarding the financial resources of the accused person, the complexity of the nature of the trial and charges, and the accused person's capability to defend themselves. Courts are reluctant to second-guess the decision making of the Legal Aid systems and will only therefore order state funding where this is necessary to ensure a fair trial. There will often be an opportunity for counsel to enter into the LSR with the accused person for the conduct of the Rowbotham application itself so that, if unsuccessful, the lawyer will not be further committed to the conduct of the criminal defence file.

#### **Where a Criminal Law LSR May Be Appropriate**

While each situation will be determined on its own unique set of facts, some services are more amenable to the LSR than others. Below are some services that may be appropriate under the LSR.

##### **a. Legal Opinions on Merits of Certain Issues**

An opinion on the merit of a legal argument can provide invaluable assistance to a client having to make decisions in criminal matters. Legal opinions may be sought to assist the client in determining:

- their plea;
- whether there are any Charter arguments;
- admissibility of evidence;
- strength of the case against them;
- existence and strength of defences;
- consequences of a finding of guilt; and
- avenues, timelines and merit of potential appeal.

<sup>6</sup> See *R v. Rowbotham* (1988), 25 O.A.C. 321 (Ont. C.A.).

The opinion should be presented in writing and ought to set out what material the lawyer is basing their opinion on. It should not be unlike an expert's opinion and for the same reason: a client must understand what the lawyer has and has not considered when coming to the conclusion provided. It remains the lawyer's responsibility not to provide an opinion without reviewing material that would be vital in providing a competent opinion on the issue. For example, it would likely not be considered competent practice to provide a legal opinion based solely on a client's description of a case without first reviewing disclosure.

### **b. Representation to Advance Certain Issues**

After full review of their disclosure, a client may wish to reduce costs by not advancing certain arguments of questionable merit. The LSR which is limited to certain issues only can reduce preparation and resource time. It is easier to agree to limit the scope of the issues when the evidence is already determined, as in an appeal or legal brief after evidence in a trial. If a client wishes to enter into the LSR in advance of trial, it is necessary to ensure the client understands this decision is a tactical one. A client will not be given another opportunity on appeal or otherwise to advance evidence or arguments which could have been advanced at trial. In all situations, the lawyer has to consider whether the limitation compromises their ability to provide competent services.

### **c. Representation for Pretrial Applications Only**

Pre-trial applications often involve questions of law which are too complicated for a self-represented person to navigate. Pre-trial applications often involve Charter-based arguments of admissibility of evidence, right to disclosure, court-ordered state funding, unreasonable delay, and right to counsel. Pre-trial applications may also include challenges to the constitutionality of legal provisions. The LSR which stipulates that services will only be provided for pre-trial applications equips an accused person with the legal acumen required to advance complex legal argument.

### **Closing Words of Caution**

As with many decisions in the practice of law, just because a lawyer can technically do something does not necessarily mean that the lawyer should do so ethically. Below are some suggested questions to consider when faced with a request to enter into the LSR on a criminal law matter.

#### **Q #1 - Can the issue the client is seeking assistance properly be dealt with in a LSR?**

Regardless of the client's desire to have legal advice on a limited issue, it is the obligation of the lawyer to determine whether he or she can give competent legal services based on the limited scope. This determination will invariably require the lawyer to consider:

The complexity of the matter, including: the nature of the charge, the potential consequences the accused person is facing, and the complexity of the issues facing the accused beyond the LSR;

Whether the issue(s) the client seeks advice on can be properly segregated from the rest of the matter;

The sophistication of the client; is the client able to understand the limited advice and communicate it to the court?; and

Whether the court will accept a limited role for counsel under the LSR.

#### **Q #2 - Is the LSR in the best interest of the client, even given their limited resources?**

The lawyer should consider whether there are any other agencies that could provide full services within the financial abilities of the client. Such agencies include duty counsel, Legal Aid, legal clinics at Law Schools, not-for-profit organizations, and junior counsel. As discussed above, in some cases it might also be more beneficial for an accused person to be self-represented.

#### **Q #4 - Should the court or the Crown be notified of the LSR?**

If the services under the LSR include appearing in court, the Court and Crown prosecutor must be informed of the LSR to ensure fairness and that the court is not misled.

**Q #5 - What obligations will the lawyer have to the court regardless of the limited obligations to the client?**

Even if obligations to the client are clearly stated in a written LSR, by going on record as counsel, a lawyer engages other obligations to the Court. In order to make it more likely the Court will have no difficulty with a limited defence counsel role, it is recommended that the LSR be addressed in a pre-trial or case management conference on the record and in the presence of the accused person.

**Q #6 - Do ethical obligations make the LSR infeasible?**

The goal of enhancing access to justice is not at the expense of the provision of competent service. A lawyer must not enter into the LSR if the terms contemplate not taking steps that would be required to competently perform the services within the scope of the LSR. One of the most time consuming and costly services of a lawyer is to review disclosure. However, the review of disclosure is vital for nearly all functions on a criminal file. In only the most rare of circumstances would a lawyer be able to provide competent services under the LSR with a term restricting the review of disclosure.

**Q #7 - Can the agreement be clearly reduced to writing?**

A lawyer must ensure the client's understanding of the nature, extent and scope of the LSR and confirm the understanding in writing. The agreement should not only set out the limited extent of the services, but also: (1) other resources the client could access which would provide full retainer services, (2) the services not being performed, and (3) the risks associated with the LSR. It is recommended the agreement be signed by both the client and the lawyer and any expansion or amendments to the LSR be done in writing and signed by both parties. Upon the conclusion of the services to be provided under the LSR with a term restricting the review of disclosure.

**Q #8 - Have you discussed with the client the other potential work flowing from the LSR and associated costs?**

It is good practice to discuss at the outset what other assistance the accused person might also require, and the associated costs. Since the retainer agreement does not necessarily terminate at the natural conclusion of the criminal matter, it is recommended the client and lawyer discuss other services the client may wish to engage in after the obligations under the LSR cease. Having such discussions at the time of entering into the LSR preserves the interests of the client as well as the reputation of the lawyers. As the aim of the LSR is to increase access to justice at a decreased cost, it is important the result of the LSR is not to provide serial services at a cost greater than a full retainer. Providing clients with all the information before they are in the heat of the moment of carrying on alone at the end of the LSR will assist in ensuring both the appearance of and that justice is actually being served.

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Whether by function of the Criminal Code or by agreement, a criminal law LSR must be carefully navigated by a lawyer acting competently and a fully informed accused person.

The fact that many options exist in criminal law to assist the accused in having full representation places an additional burden on the lawyer to ensure that the LSR is what the client really wants and that it is in his best interests before agreeing to act. Access to justice should be fostered and all lawyers have an obligation to assist people who need legal advice and services - especially when they are defending a criminal accusation. The LSR can, and should, play a role in the administration of criminal justice provided that it truly assists the accused person to make full answer and defence. ❁

Michael Bates is a partner at Ruttan Bates barristers and solicitors. His practice remains largely based in criminal and quasi-criminal trial and appellate matters, but also includes a significant administrative and civil-constitutional component dealing primarily with matters of alleged police misconduct. Mr. Bates has appeared at all levels of court including the Supreme Court of Canada, handled several matters before the Law Enforcement Review Board, acted in Law Society of Alberta complaint proceedings, commenced private prosecutions of criminal and regulatory offences and has successfully defended the private property of citizens facing civil forfeiture applications. Mr. Bates has served the Canadian Bar Association for several years, both as an elected executive member of the National Criminal Justice Section, and as a current Co-Chair of the branch Criminal Section (South). He has also been counsel to Student Legal Assistance (2007 - 2010) and has coached the Alberta Court of Appeal moot team at the University of Calgary from 2007 to the present. In addition to editing bar admission materials for the Legal Education Society of Alberta, and presenting to the Canadian Association of Provincial Court Judges, Mr. Bates is very proud to have been a recipient of the W.B. Kelly, QC Memorial Prize for distinction in ethics from the Law Society of Alberta. At the upcoming 2014 Alberta Law Conference, Mr. Bates will be acting as Co-Chair and presenter for the joint criminal and immigration law panel.

Jennifer is a partner at Ruttan Bates barristers and solicitors. Her practice is dedicated primarily to criminal defence work, both as trial and appellate counsel. The scope of Ms. Ruttan's practice includes representing clients with quasi-criminal matters, such as: income tax evasion charges under the Income Tax Act, insider trading violations under the Alberta Securities Act, and unfair trade practices under the Fair Trading Act. The varied practice has afforded Ms. Ruttan extensive experiences in all levels of court including the Supreme Court of Canada, administrative tribunals, judicial dispute resolution and mediation. One of the most enjoyable forums Ms. Ruttan has appeared in is the classroom. She has enjoyed the privilege of instructing since 2008 at the LESA Intensive Advocacy course and at the University of Calgary Advocacy course. Such experiences also afforded her the opportunity to be a guest instructor with the Trial Advocacy course in Yellowknife in 2011. As well, Ms. Ruttan enjoyed working with law students at the University of Calgary in the role of counsel to Student Legal Assistance (2007 - 2010), as moot coach, and educational presenter. She has also had the pleasure of participating in demonstrations of electronic trials to the Provincial Court Judges and presenting on behalf of the Canadian Bar Association Criminal Section. Continuing legal education is of primary importance and interest to Ms. Ruttan, and she currently sits on the Legal Education Society of Alberta's Board of Directors.

LIMITED SCOPE RETAINERS

Innovations in the Provision of Alberta's Legal Aid Services

By Andrea G. Doyle
& Jocelyn L. Hill



Andrea G. Doyle

Faced with budgetary restrictions and a decline in the price of oil, Legal Aid Alberta ("LAA") has looked into new and innovative ways to provide legal services to Alberta. Following a request in 2009 by the then Justice Minister, Alison Redford for a review of the Alberta Legal Aid system, LAA revised its service delivery model.



Jocelyn L. Hill

Our new model now includes the provision of limited scope retainers ("LSRs") for certain clients and discrete tasks. Clients of LAA may be provided any of the following services, namely; information and referrals, legal advice, brief services, settlement

services, limited scope service contracts and of course, the traditional full legal representation. We believe we are the first legal aid plan in Canada to pilot and utilize LSRs.

Limited scope representation describes the situation where a lawyer provides assistance to a client with part, but not all, of their legal problem. With this type of practice, the lawyer takes on a defined task to assist the client. For LAA, this is a big shift from providing full representation certificate for each family law client.

In April 2010, LAA began piloting the provision of limited scope services contracts as one of the options available to assist our clients. In February 2010, prior to commencing its pilot project, LAA had the benefit of Sue Talia, a Private Court Judge from California, and leading expert on limited scope retainers, come to Alberta to train staff. Staff counsel at LAA developed Alberta-friendly precedents and utilized Sue Talia's best practices and risk management tools. We wanted to be careful and ensure our limited scope retainer practice was well documented.

We have developed our own limited scope service agreement that is reviewed and executed by the

lawyer and client prior to engaging in any limited scope representation. We feel a good and thorough diagnostic interview is also a must. Drawing the box and staying inside of the limits of the retainer is essential and we insist on re-drawing the box as things change as they frequently do with our family law clients. LAA has spent considerable time and effort to train staff and roster lawyers on limited scope practice and to share LAA's precedents. We also recognized the importance of liaising with the Bench and stakeholders to maximize our success with LSRs.

The original pilot commenced in April, 2010, in the Edmonton Provincial Court. It was then expanded in March, 2011, to include the Court of Queen's Bench as well as the Provincial Court in Edmonton, Calgary, Red Deer, and Lethbridge, areas of Alberta where LAA has staff offices to provide limited scope representation.

LAA issues Limited Scope Service Contracts to lawyers for 7.5 hours, to assist clients with clearly defined tasks such as:

- Drafting of pleadings or affidavits;
- Providing legal advice at any stage of a client's involvement in the legal process;
- Providing out of Court assistance in negotiations to resolve legal issues; and
- Providing limited in-Court representation to assist on a court matter - always advising the Court and other counsel or parties of the limits of the partial retainer.

At LAA, we have found that the key to the success of LSRs is to ensure that our client is a good candidate for limited scope representation. Our client must be able to understand and appreciate the limits of the LSR. In addition, a good limited scope representation candidate is one who:

- Is literate;
- Does not have mental or emotional disorders;

- Is motivated to do tasks;
- Does not have language barriers;
- Has a capacity to self-represent and understand the limits of the retainer;
- Has an absence of drug or alcohol addiction; and
- Is not in a situation involving domestic violence.

Limited scope representation is not for every client or for every file. A thorough first interview is crucial. We have found that it takes a relatively sophisticated client and uncomplicated issue for limited scope service contracts to work. Unfortunately, neither is the norm for our Legal Aid family clients.

Since we started our original pilot at LAA, the Alberta Rules have come into force. The rules allow for limited scope representation pursuant to Rule 2.27, provided the Court is advised orally or in writing of the limits of the retainer. At LAA, we have opted in the Queen's Bench and in the Provincial Court (where permitted) to file Notices of Limited Scope Retainers to ensure the Court, opposing counsel, and opposing party are clear on the limits of our retainer. Our experience has been that the Court is happy to have a lawyer provide some services and advice to a client rather than be faced with an entirely self-represented party.

We also make sure to file a Notice of Withdrawal at the end of the retainer so that the court and opposing party knows our involvement is at an end. It is a requirement of Rule 2.27 that the client attend all court appearances with the lawyer on a limited scope retainer. We take the position that the client remains on the record as a self-represented litigant throughout our involvement. Therefore, the normal Rules for getting off the record as counsel of record do not apply to us. We do not believe that we are bound by Rule 2.29, which requires a lawyer of record to remain on the file 10 days after service of the Affidavit of Service of the Notice of Withdrawal. It is our position that upon the filing and service of the Withdrawal we have no further obligations on the file, except perhaps to approve the terms of the written order. To our knowledge, there has been no case law which undermines our position on this issue.

We have a number of precedents to assist counsel with this type of work. They are:

- Notice of Limited Scope Retainer for Queen's Bench;
- Notice of Withdrawal for Queen's Bench;
- Notice of Limited Scope for Provincial Court;
- Notice of Withdrawal from Provincial Court;
- FAQ sheet for clients;
- FAQ and best practices sheets for lawyers; and
- Limited Scope Retainer Agreement.

These precedents are available on the Pro Bono Law Alberta (PBLA) website at www.pbla.ca. Lawyers may need to register on this website to get access to the materials, but registration is quite quick and easy.

Sue Talia has also provided us a link to a free seminar that she did in 2012. This seminar is more focused on doing this work from a private practice perspective. The seminar can be viewed at http://www.pli.edu/Content/Seminar/ExpandingYourPracticeUsingLimitedScope/_/N-4kZ1z12uzg?Npp=1&ID=153405&t=MDN2_8ZEM3&utm_source=8ZEM3&utm_medium=EMKTG&utm_campaign=MDN2.

The number of referrals of our Legal Aid clients to limited scope service contracts has been lower than originally anticipated. The reality is that many of our clients are not good candidates for this type of representation. Nevertheless, we have had success on a number of files where we have had suitable candidates.

Circumstances often change in family law work and what may originally seem like a good case for the LSR may blossom into very time intensive litigation. In these circumstances, we may refer the matter back to the appointing Legal Aid officer and ask for a full coverage certificate.

The biggest challenge for Legal Aid lawyers who have practiced in this area is to avoid getting drawn into doing more work than the limited scope retainer permits. It is normal for most of us, as lawyers, to believe that if we helped the client with their entire

file, we would probably do a better job than they would be able to do by themselves. The discipline for us in the Legal Aid context is that we have a limited number of hours to get something accomplished. The point is that some help is better than none. In an age of stretched resources and courts which are overloaded with self-represented litigants, any assistance which can be provided these litigants is better than none.

From the first interview, the focus is on where our legal expertise would be most useful and at what time. If someone has just filed their parenting application in Provincial Court, we might decide that it is better not to utilize our time immediately. We might just give the client a reality check of what is likely to happen after trial and then have them proceed to a Judicial Dispute Resolution or other form of ADR to try and resolve the matter by themselves. If that is unsuccessful, we might either get involved to prepare the client for the hearing or, if the hearing is short, step in and run the hearing for them. Alternatively, if the file looks very close to settling at the outset, it might make more sense to come in at the JDR stage to maximize the chances of resolving the file.

Generally, we have found the bench and opposing counsel supportive of the limits of our retainer. Of course, once an opposing party finds out our time is limited, there is sometimes an effort to waste time in order to bring our retainer to an end. Sue Talia points out that the LSR works best for a single issue or a single task. We would agree. In family law, circumstances are fluid and a restriction as to hours is somewhat difficult to work with. Nevertheless, many of our limited scope files are successfully resolved and closed within the 7.5 hour limitation.

The Family Justice Working Group chaired by Justice Cromwell has recommended that Legal Aid be defined as “providing a broad range of services including limited scope representation”, and has further recommended that “professional Codes of Conduct and Court Rules in all jurisdictions be reviewed to authorize and support the use of limited scope retainers” (see Recommendation 16 of the Report).

LAA remains committed to being innovative and providing limited scope service contracts for appropriate clients. LSRs will continue to be one of the many tools in our toolbox for providing access for justice to vulnerable Albertans. ❁

Andrea G. Doyle is the Assistance Senior Counsel of the Family Law Offices in Edmonton, Wetaskiwin, and Central Alberta, all staff offices which are part of Legal Aid Alberta. Ms. Doyle is the Chair of the Implementation Team for the Legal Aid Alberta Pilot Project on limited scope representation, which has been running since April 2010 and was very involved in development and delivery of Limited Scope Service Contracts for some qualified Legal Aid clients. Ms. Doyle currently chairs the Working Group on Limited Scope Retainers, a collection of stakeholders with representation from government, the Law Society, Legal Aid Alberta, Pro Bono Law Alberta, the Canadian Bar Association - Alberta Branch and private bar lawyers who are dedicated to promoting limited scope retainers and educating the Alberta Bench and Bar on Limited Scope Representation. Ms. Doyle is also a member of the Law Society of Upper Canada, and practiced with the law firm of Doyle Speirs in Ajax, Ontario from 1994 to 2007. She has a passion for representing children whose parents are involved in family law matters. Prior to relocating to Alberta, Ms. Doyle was a member of the Children's Rights Panel with the Office of the Children's Lawyer in Ontario.

Jocelyn L. Hill is a lawyer who has practiced at the Family Law Office of Legal Aid Alberta since 2001. Previously, she was staff counsel at Calgary Legal Guidance. Her practice focuses on appeals, international child abduction, and limited scope files. She piloted limited scope retainers in Calgary for Legal Aid in 2011 and has trained Legal Aid roster lawyers in the practice.

By Gillian Marriott, QC
& Joshua Lam

A "Conflict-Free" Method for Making an Impact with *Pro Bono* Work



Gillian
Marriott, QC



Joshua Lam

If you haven't already read the Canadian Bar Association's Equal Justice Report on the state of Access to Justice in Canada, then allow me to summarize it for you: there is a serious crisis of access to the justice system and legal services. The word "abysmal" was tossed around a few times. There are many different ideas on how to address this problem, and one of the tools now available to lawyers to open up more affordable legal services is through the use of limited scope retainers. However, even if this reduces the expense of legal fees for clients, there will still be individuals who are simply unable to afford any legal services. And, according to Rule

1.01(2) of our *Code of Professional Conduct*, it is our duty, as lawyers, to participate in *pro bono* activities designed to assist these individuals. *Pro bono* work also just happens to be good for the soul, is often fun, and files allow lawyers to sharpen up skills and knowledge that may have gotten a little dull after years of focusing on one area of law.

Unfortunately, there tends to be a reluctance to engage in *pro bono* work, for a variety of reasons, all related to some sort of fear: fear of not making billable targets for the month, fear of getting a "crazy" client or an unusually burdensome file, fear of running into conflicts (both real and "business" conflicts) with a paying client, and fear of being outside of one's "legal area of expertise". We are happy to report that these fears are largely groundless. Thanks to buy-in from firms, updated rules, and a wide array of educational and informational support, it is now easier than ever to engage in meaningful *pro bono* work that will not severely cut into your practice time, threaten your client base, or put you at risk of getting sued for trying to assist a client.

A major tool that makes *pro bono* work more straightforward and palatable for lawyers is the Limited Scope Retainer. Limited Scope Retainers ("LSR") are not only a great resources for making legal services more affordable and growing your

practice, but they are also perfectly designed to let you do *pro bono* work in a setting that fits your comfort level and time commitment. In particular, the LSR is a great way of alleviating the fear of excessively burdensome *pro bono* files, and our Code of Professional Conduct contemplates how to deal with conflicts issues in Rule 2.04(7) (Pro Bono Service):

(a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:

i. May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm, or the non-profit legal service provider; and,

ii. May provide legal services, unless the lawyer is aware that the lawyer of the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal service provider.

(b) In the event a lawyer provides short-term legal service through a non-profit services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake to continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

When the Code mentions "short-term legal services", most often you will think of things like the "evening clinics" held at Calgary Legal Guidance or Edmonton Community Legal Clinic, or working a shift at Pro Bono Law Alberta's (PBLA) Civil Claims Duty Counsel. However, short-term legal services can also include drafting pleadings, writing a demand letter, helping a self-represented litigant with a chambers

application, and any number of other, limited services where there is a clear understanding that you are providing brief, temporary services. Perhaps more importantly, the Rule makes it clear that addressing conflict issues is a matter of making yourself reasonably “aware” of direct conflicts. All of the clinics and *pro bono* projects have the information that you require to put your mind at ease about direct conflicts. With the use of limited scope services, there is also the added benefit of being able to provide clearly defined and temporary assistance to an individual, even where there could be a “potential” conflict, perhaps in the future. For example, it is often the case in Bankruptcy and Foreclosure proceedings that volunteer lawyers are hesitant to act, given the potential for conflict with large corporate clients (i.e. Banks). However, where a lawyer provides a self-represented litigant with services that are clearly defined and limited in nature, the worry about “potential conflicts” should be virtually nil. Providing background information, filing instructions, document preparation, or any number of other services can be of critical assistance to an individual, and they can all be done through a lawyer’s general legal tool bag. You do not need to solve all of the individual’s problems, nor should you. Ultimately the goal of *pro bono* work is not necessarily to “win” cases, but to make the justice system more accessible.

This is the reasoning behind PBLA’s new pilot project, the Queen’s Bench Amicus Project. Recognizing that the growing number of self-represented litigants at the higher levels of courts

are placing a burden on the court system, PBLA has designed a project where volunteer lawyers can help individuals make applications in chambers, effectively functioning as “Queen’s Bench Duty Counsel”. We have had tremendous support from the Courts, law firms and lawyers on this project, and we are hopeful that we can extend and expand this project in 2014. In particular, we think that a key component of this project is that volunteer lawyers are providing limited services as “Friends of the Court”. Individuals understand that the lawyers are not “their lawyers”, and the Masters and Justices understand that the volunteer lawyers are attempting to assist the Court, rather than to advocate one side of a case. It focuses on what we think is a key component of our duty to provide *pro bono* services - to ease the *procedural* burdens of the legal system without always engaging in the *substantive* portions of cases, or necessarily focusing on resolution.

It’s true that not every case or individual will be well-suited to *pro bono* work. However, with the use of Limited Scope Retainer, the number of ways that lawyers can volunteer their time to help the public keeps getting larger. It means we can be creative in tackling access to justice issues, so long as we are clear in what work we are doing for individuals (and what work we are NOT doing for them, as well).

So, it is not about asking *how* to get more involved in *pro bono* work, the question is **why** aren’t you doing more *pro bono* work? ❁

Gillian Marriott, QC is Executive Director of Pro Bono Law Alberta (PBLA), a not-for-profit organization with a mission to improve access to justice by increasing the scope and availability of pro bono legal services for low income Albertans. Ms. Marriott has also recently returned to the practice of family law, having joined Widdowson Kachur Ostwald Menzies LLP as Counsel on a part time basis in August 2013. Ms. Marriott is an elected Bencher of the Law Society of Alberta (LSA) and a Past President of the Alberta Branch of the Canadian Bar Association (CBA). She has been an active member on several LSA and CBA committees over the years. In addition, she is an Adjunct Assistant Professor of Family Law at the University of Calgary, Faculty of Law, has been a guest lecturer and instructor and has published several papers and articles. Her community involvement includes being a member of the Board of Directors of the Immigrant Access Fund, a Past Chair of Children’s Legal and Educational Resource Centre, Past Project Supervisor of Pro Bono Students Canada and Past Legal Clinic Volunteer with Calgary Legal Guidance. Prior to joining PBLA in 2009, Ms. Marriott was a Co-Managing Partner with Dunphy Best Blocksom LLP in Calgary, practicing exclusively in the area of family law.

Pro Bono Law Alberta welcomed Joshua Lam as the new PBLA Program Coordinator in August 2013. Josh is a lawyer, called to the Alberta Bar in 2011, who just returned to Alberta after spending a year and a half living in East Africa. He was doing work in access to justice, human rights, and international criminal justice for the International Commission of Jurists. Mr. Lam has been working in access to justice and poverty law issues since he was the Legal Education and Reform Coordinator at Student Legal Services in Edmonton. In his role as program coordinator, Mr. Lam will be taking over the day-to-day operations of the Civil Claims Duty Counsel Project and the Volunteer Lawyer Services Program, as well as assisting PBLA in overall organizational work including online communications and marketing. PBLA is happy to have him on board.