



Unbundled legal services:

Pitfalls to avoid

At its September 2011 meeting, Convocation approved amendments to the Rules of Professional Conduct to give guidance to lawyers who provide legal services under limited scope retainers, also called “unbundled” legal services. LAWPRO is concerned that the more widespread provision of unbundled legal services in Ontario will increase malpractice claims. This article will help you understand some of the risks inherent in providing limited scope legal services, and how you can reduce your exposure to a claim when working for a client on an unbundled basis.

What are limited scope or “unbundled” legal services?

At its very simplest, the “unbundling” of legal services, also commonly called “limited scope representation” or “a limited scope retainer” (which now is a defined term under the Rules), is “the provision of legal services by a lawyer for part, but not all, of a client’s legal matter by agreement between the lawyer and the client.”

Limited scope legal services are already occurring in many areas of practice in Ontario. Practically speaking, LAWPRO

would see the provision of limited scope legal services as typically falling into one of three general categories:

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

The biggest claims risks

LAWPRO’s concern that unbundling could lead to more claims stems from the fact that the biggest causes of claims against lawyers – communication issues and inadequate investigation or discovery of facts – are at least equally, if not more likely, to occur during the provision of unbundled legal services.

For lawyers at all sizes of firms, communication/relationship issues between the lawyer and client are the biggest cause of LAWPRO claims – representing more than one-third of LAWPRO’s claims and costs in most areas of practice over the last 10 years. The three most common communication-related errors are:

- a failure to follow the client’s instructions;
- a failure to obtain the client’s consent or to inform the client; and
- poor communications with a client.

Another major source of claims is inadequate investigation or discovery of facts representing about 15 per cent of all LAWPRO’s claims over the last 10 years. This error goes to the very core of what lawyers are supposed to do for their clients – give legal advice tailored to the client’s specific circumstances – and

basically involves the lawyer not taking a bit of extra time or thought to dig deeper and ask appropriate questions on the matter.

Risks that arise when legal services are unbundled

When a lawyer is working for a client on a limited scope retainer, the exact scope of that retainer becomes even more important in terms of the client’s expectations as to the work the lawyer is to do and not do on the matter. Given this increased opportunity for confusion, it is critical that lawyer/client communications are clear and unambiguous.

A lawyer who is interviewing a client with an eye toward limiting the scope of the representation must interview the prospective client as carefully as that lawyer would a client who can afford full representation.

Moreover, limiting the interview of a client simply because other legal issues are not going to be pursued by the lawyer could place that lawyer at risk of failing to advise the client to seek other counsel, or of an impending deadline or statute of limitations issue, which in turn may open the lawyer to a malpractice claim.

One of LAWPRO’s biggest concerns is that lawyers who limit the scope of their representation may nonetheless be held accountable for failing to warn the client of material legal issues or claims, even though they were not part of the limited scope representation agreement. Courts in the U.S. have held lawyers liable for malpractice in this circumstance.

Failure to explain the risks of limited scope retainers

Further to an amendment to the commentary under the definition of “competent lawyer” in the Rules, an extra obligation imposed on the lawyer providing unbundled legal services to a client is the need to obtain the client’s understanding and consent to the limited scope of the representation.

That consent must be an “informed consent” and should include disclosure by the lawyer of the risks and disadvantages of limiting the scope of the representation.¹ The type and extent of information needed to satisfy that the “consultation” requirement was met will vary with each client and the client’s ability to understand. If a client has not regularly used a lawyer, extra care should be taken to ensure that the client truly understands the limits of the representation and consequent risks.

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

In the case where something was not done that allegedly should have been done (and the client will frequently judge this with the uncompromising and impossible standard of 20:20 hindsight), clients frequently argue that the lawyer should have completed the step in question and that the client never agreed that the lawyer would not be responsible for doing it.

How to reduce your exposure to a claim

Here are several steps you can take to reduce your exposure to a claim when providing legal services on a limited scope basis:

Limited scope representation does not mean less competent or lower quality legal services: The commentary to Rule 2.01 “Competence” specifies that a lawyer considering whether to provide legal services under a limited scope retainer must carefully assess in each case whether, under the

¹ 669283 Ontario Ltd. v. Reilly, [1996] O.J. 273 (Gen. Div.)



circumstances, it is possible to render those services in a competent manner. And further, new Rule 2.02(6.1) provides that: “Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.”

Thus, under the Rules, a lawyer and client can limit the scope of representation and agree on the means used to achieve the client’s goals or objectives. However, while the Rules afford the lawyer and client great latitude to limit the time spent or costs of the representation, the limitation must be reasonable under the circumstances. Limitations will not be considered reasonable if the time allotted is not sufficient to yield advice upon which the client can rely. Lawyers providing unbundled legal services owe the same duties of competence, diligence, loyalty and confidentiality to limited-scope clients that they owe to full-service clients. Don’t be tempted to fall below the required standard of care just because you are handling a matter on a limited scope basis.

Identify the discrete collection of tasks that can be undertaken on a competent basis:

Take the time to understand the specific tasks and/or legal issues on which the client is seeking assistance. Make sure there are discrete tasks that you can undertake on a competent basis, and consider how ethics and court rules apply to the tasks you choose to handle.

Confirm the scope of the limited retainer in writing:

As amended, new Rule 2.02(6.2) directs that “When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.” Put in writing the discussions and agreement with the client about the limited scope retainer; doing so will both assist the client in understanding the limitations of the service to be provided and document the extent of the retainer in case it is questioned at a later point in time. Rule 2.02(6.3) specifies some limited exceptions to the limited scope retainer writing requirement.

Clearly document work and communications:

At every step of the matter, take steps to ensure it is clear to the client what tasks you are or are not responsible for, and keep a record of all communications (information and instructions provided by the client, advice given by the lawyer). Lawyers can significantly reduce their exposure to a claim by controlling client expectations from the very start of the matter, actively communicating with the client at all stages of the matter, creating a paper trail that documents communications, and confirming what work was done on a matter at each step along the way.

Be careful with communications when opposing counsel is acting on an unbundled basis:

The commentary under Rule 2.02(6.2) provides that: “A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed.” This recognizes that in the unbundled context a lawyer will deal with opposing counsel on the matters within the scope of a limited retainer and directly with a client on matters outside the scope of the retainer. The new Rule 6.03(7.1) provides some

specific directions on how and when to communicate with opposing counsel and client in the unbundled context. Note that court rules and procedures have yet to be amended to specifically address some of the issues raised in the unbundling context (e.g., communicating with counsel who is only handling some issues on a matter; dealing with a client under a disability; going on or off the record; or the ghost-writing of pleadings).

Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems:

Further to new commentary under Rule 2.02(6), limited scope representation will generally not be appropriate if a client’s ability to make adequately considered decisions in connection with the matter or representation is impaired due to minority, mental disability or for other reasons. That commentary states: “A lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.” Lawyers should take care when they are providing unbundled services to clients who are or might be under a disability.

Be careful providing further assistance to a client after a limited scope retainer is terminated:

In many cases, a matter handled on a limited scope retainer basis will have started before the lawyer became involved and/or will continue on after the work the lawyer agreed to do was completed. If the client comes back for further assistance, the lawyer should make sure a new full or limited scope retainer is in place.

Conclusion

Unbundled legal services are one solution to the complex issue of access to justice and are likely to become more commonplace. Being aware of the risks of unbundled legal services and prepared to take the steps outlined in this article will help you reduce your exposure to a malpractice claim. ■

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