



**Ontario Bar Association Submission to the
"Unbundling Working Group of the Professional Regulation Committee",
Law Society of Upper Canada,
Regarding Limited-Scope Legal Services/Representation**

Date: January 20, 2011

Submitted to: Law Society of Upper Canada

Submitted by: **Lee Akazaki**, President; and
**John O'Sullivan and Morris
Chochla**, Co-Chairs Limited-Scope
Legal Services Working Group



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Table of Contents

The OBA.....	2
Overview of the OBA's position on changes to the Rules of Professional Conduct.....	2
1. Ethical Guidance Issues Identified in the LSUC Letter.....	4
(a) Clarity of the agreement between the lawyer and the client:.....	4
(b) Communications between counsel and the adverse client who is receiving limited services, and disclosure about limited service retainers.....	4
2. Additional Ethical Guidance Issues Identified by the OBA.....	4
(a) Is the work <i>capable</i> of being done on a limited service basis?.....	4
(b) Will the promotion of LSA's tend to promote access to justice?.....	5
3. Procedural Issues in Litigation.....	5
4. Other Comments by the OBA.....	7
(a) Continued reliance on the lawyer's professional duty.....	7
(b) Image of the profession.....	7
(c) Standard of Care.....	7
5. Comments on the Draft RPC Amendments.....	8
Proposed Change 1.02 – Definitions: 'limited legal services'.....	8
Proposed Change: 2.01 – Competence, Commentary.....	8
Proposed Change 2.02(X), (a) – Quality of Service.....	9
Proposed Change 2.02(X), (b).....	9
Proposed Change 2.02(X), Commentary –.....	10
Proposed Change 2.02 (6) – Client under a Disability – Commentary.....	10
Proposed Change 2.09 (X)– Withdrawal.....	10
Proposed Change 2.09 (X)– Withdrawal – Commentary.....	11
Proposed Change 4.01 (X) Advocacy.....	11
Proposed Change 6.03(X) – Responsibility -.....	12
Proposed Change 6.03(X) – Responsibility, Option 1 Commentary.....	13
Participants.....	15



The Ontario Bar Association (“**OBA**”) appreciates the opportunity to assist with the issue of limited-scope legal services. These are the comments and views of the OBA given in response to the Law Society of Upper Canada’s letter of October 8th, 2010 (the “**LSUC Letter**”).

We have addressed:

1. The ethical issues identified in the LSUC Letter;
2. Additional ethical issues identified by the OBA;
3. Key procedural issues associated with limited scope services in litigation;
4. Other comments by the OBA; and
5. Comments on the draft Rules of Professional Conduct (“**RPC**”) amendments.

The OBA

As the largest voluntary legal organization in the province, the OBA represents 18,000 lawyers, judges, law professors and students in Ontario. OBA members practice law in no fewer than 36 different sectors. In addition to providing legal education for its members, the OBA has assisted government and LSUC with several policy initiatives - both in the interest of the profession and in the interest of the public.

The submission was formulated by more than a dozen practice areas, including: Aboriginal law; Alternative Dispute Resolution; Civil Litigation; Citizenship and Immigration; Construction law, Criminal Justice; Education Law; Family Law; Feminist Legal Analysis; Information and Technology; Labour and Employment; Workers’ Compensation; Business Law; Trust and Estates Law; and Municipal Law, as well as our Access to Justice Committee and our Young Lawyers’ Division. It has had the benefit of input and comment from all 36 of our practice sections

Overview of the OBA’s position on changes to the Rules of Professional Conduct

Limited-scope retainers are a long-standing reality in the corporate context and an emerging reality in the litigation, administrative and family-law contexts. It is appropriate that the RPC addresses the issues. As detailed below, the position of the OBA is that the RPC changes, and limited-scope services generally, should, first and foremost, promote increased access to justice. An overview of the OBA's position is as follows:



- (a) The recognition of limited-scope services in the RPC should not be seen as an alternative to continued efforts to provide financial assistance for vulnerable clients and to make the justice system more affordable;
- (b) Vulnerable clients must be protected by a requirement that the client is given a clear explanation of the limits on the service that will be provided. In addition, services must not be limited inappropriately such that there is little or no value to the service provided;
- (c) Changes to the RPC must not add unnecessarily to the time and expense of a matter or adversely impact services. For example, the proposed requirement for a written agreement when a lawyer renders limited-scope advice, would render the provision of duty counsel or legal clinic services virtually impossible;
- (d) In the litigation, administrative and family-law contexts, changes to the RPC alone are not sufficient. Corresponding changes to the rules of practice (both in courts and tribunals) and changes to the law of negligence are also necessary;
- (e) While guidance from the RPC is helpful, the lawyer's professionalism must ultimately be relied on for determining what advice is appropriate concerning limited service retainers. It must be clear there is no retreat from the rule that a client is entitled to the undivided loyalty of the lawyer.
- (f) Education undertaken by LawPro, the Law Society and others would assist the profession in complying with its obligations when giving limited-scope advice.



1. Ethical Guidance Issues Identified in the LSUC Letter

(a) Clarity of the agreement between the lawyer and the client:

OBA Comment: The client must clearly understand the nature extent and, scope of the services to be provided in a limited service agreement ("LSA"), particularly where the client is not well-versed in legal matters. The limitations of the advice can be simply laid out in the advice letter (e.g. "I have only been asked to comment on the taxation implications of this transaction", or "The following are the facts you have provided to me. My advice is based on these facts."). The RPC should not require LSAs to be in writing. That would be counterproductive to the goal of access to justice. A sample agreement would be helpful, to provide guidance only.

(b) Communications between counsel and the adverse client who is receiving limited services, and disclosure about limited service retainers.

OBA Comment: A lawyer must not be permitted to communicate directly with an adverse party on a matter within the scope of a limited retainer but must be allowed to speak directly to that party on issues outside the retainer. Rules dealing with the disclosure of the scope of the retainer to opposing counsel must respect privilege and confidentiality.

2. Additional Ethical Guidance Issues Identified by the OBA

(a) Is the work *capable* of being done on a limited service basis?

OBA Comment: There are circumstances in which providing a limited legal service is not appropriate. Where there is a request for a limited service that will be of little or no value to the client's ultimate goal, the lawyer should so advise. For example, if a lawyer were asked only to draft corporate documents and perform registrations for a company that could not operate without a special license (e.g. from the CRTC), the lawyer should not accept the retainer without, at least, providing the advice that the license is required. To take another example, a lawyer



should not accept a retainer to provide advice on the property and support aspects of a divorce without providing the advice that an acceptable custody arrangement would have to be worked out before a divorce could be granted. A lawyer should not accept a retainer limited to the preparation of court documents for a corporation, without providing the advice that the corporation will generally require representation by a lawyer in court. In other words, the lawyer should not provide services that he/she knows may ultimately be of little value to the client, unless the client has explicitly accepted that risk. This does not amount to an obligation on the lawyer engaged in an LSA to provide over-arching strategic advice where that is not within the limited service retainer, or to predict all the emergent issues at the beginning of a case/transaction. If a lawyer is retained to prepare and argue a pre-trial motion, for example, she/he must not be obliged to analyze the entire litigation strategy to determine if the motion is the best use of funds. The line should be drawn where the limited services requested will be of marginal or no value to the client.

(b) Will the promotion of LSA's tend to promote access to justice?

OBA Comment: While limited scope services may, in some circumstances, be better than no service, the permissibility and use of LSA's should not detract from advocacy for more complete access to justice, or attempt to replace public funding of full legal services. Sophisticated clients may want to avail themselves of limited services. However, limited legal services should not be considered a complete solution for those who cannot afford full service rates. Efforts on the part of the Association for Sustainable Legal Aid, for example, should continue in earnest.

3. Procedural Issues in Litigation

The goal of improving access to justice through LSA's will only be achieved if lawyers and clients are comfortable actually entering into these agreements. Changes to the RPC alone will not achieve the necessary comfort level. Changes to Legislation, Court Rules and a myriad of Tribunal Rules will also be necessary to truly achieve a culture of limited-scope services.

LSUC's "unbundling" initiative should involve a strategy, together with other legal organizations, to achieve broader reform, including initiatives to ensure courts and tribunals respect limited-scope agreements. These should include:

- a) reform of the *Rules of Civil Procedure*, *The Family Law Rules*, tribunal rules and Ontario Court of Justice ("OCJ") Rules, to recognize LSA's so that courts and tribunals do not insist that lawyers' representation of clients go beyond the scope of their retainer;



- b) reform of Rule 15 of the *Rules of Civil Procedure*, Rule 4 (11) –(13) of the *Family Law Rules* and comparable tribunal rules, to allow for a less cumbersome process for removal from the record, and to enshrine a more flexible concept of representation than the current once-and-for-all-purposes “solicitor of record” concept. In family law, for example, where many issues are decided on the basis of written materials, LSA's restricted to drafting pleadings and affidavits may add significant value for clients who cannot afford to be represented in all aspects of the matter. Under current rules, it is not possible for lawyers to put their names on the pleadings without creating an obligation to either appear on the matter or go through the cumbersome process of removing themselves as solicitors of record. On the other hand, as LawPro says in its submission, the anonymous drafting of pleadings raises a series of potential ethical and procedural problems. If the *Rules of Civil Procedure* and the *Family Law Rules* allowed a lawyer to be identified as the drafter of pleadings without creating appearance and other “solicitor of record” obligations, there would be no need to try to deal with the ethical issues surrounding anonymously drafted pleadings through the RPC; and
- c) reform of the *Negligence Act* to address apportionment of liability in limited retainer cases, and to address liability for failure to advise on the whole scope of a client’s matter. The joint liability in Section 1 of the *Negligence Act* may, for example, be inappropriate in a limited-retainer context. The recognition of limited-scope services in the RPC may not alone accomplish proper treatment of these retainers in the law of negligence. As outlined in the decision of the Supreme Court of Canada in *Galambos v. Perez*, ([2009] 3 S.C.R., at para. 29):

... there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship.... They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence....



4. Other Comments by the OBA

(a) Continued reliance on the lawyer's professional duty.

A client relies on the lawyer's professional discretion and ability. While guidance from the RPC is helpful, the lawyer's professionalism must ultimately be relied upon for determining what advice is appropriate with respect to LSAs.

(b) Image of the profession.

"Unless the litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have the confidence that the legal system .. is a reliable and trustworthy means of resolving their disputes and controversies." - *R.v. Neil*, [2002] S.C.J. No 72.

These proposed amendments to the PRC may be interpreted as designed to increase lawyers' ability to generate fees, reduce their obligations to the client and insulate the lawyer from claims for negligence.

RPC commentary should make it clear that there is no compromise or slippage of the rule that when a lawyer's obligations to a client conflict with the lawyer's personal interests, the lawyer must not put his duty of undivided loyalty to his client in jeopardy.

Education undertaken by LawPro and the Law Society would assist the profession in managing the risks and complying with professional obligations when giving limited-scope advice.

(c) Standard of Care.

RPC and the commentaries inform the professional duties solicitors owe to clients (*Galambos v. Perez, supra*). It is appropriate that the RPC address the issue of limited services agreements, because they are increasingly common practice.

The considerations outlined above are applied below to the proposed draft amendments.



5. Comments on the Draft RPC Amendments

Proposed Change 1.02 – Definitions: "limited legal services"

"limited legal services" or "limited legal representation" means the provision of legal services for part, but not all, of a client's legal matter by agreement between the lawyer and the client

OBA Comment: Acceptable

Proposed Change: 2.01 – Competence, Commentary

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

OBA Comment: Acceptable with minor change indicated above for clarity.



Proposed Change 2.02(X), (a) – Quality of Service.

Limited Legal Services

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

(a) advise the client honestly and candidly about the nature, extent and scope of such services that the lawyer can provide, including, if applicable, within the means provided by the client, and

OBA Comment: Acceptable.

Proposed Change 2.02(X), (b)

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

OBA Comment: Unacceptable.

To make it a Rule of Professional Conduct that lawyers must reduce LSAs to writing in every case would be impractical and undesirable.

Practical circumstances would sometimes make it impossible for lawyers to put limited retainer agreements in writing. Advice given in criminal matters, particularly by duty counsel who appears in set-date court or on a bail hearing only and advice given at clinics are two examples.

The point at 4(a) above, about not fettering the lawyer's discretion, also applies here. Lawyers must be free to make limited service agreements in whatever form they see fit, subject to the guidance given in the RPC commentaries and the decided cases.

There are several cases on limited retainer agreements which provide guidance to the practitioner: e.g. *Wong* (1999), 179 D.L.R. 4th 38 (Ont. C.A.); *Coughlin*, aff'd, [1998] O.J. No. 4066 (C.A.), *Fellowes McNeill v. Kansa General Int'l Insurance* (2000), 22 C.C.L. 1 (3d) 1 (Ont. C.A.).



Proposed Change 2.02(X), Commentary –

Reducing to writing the discussions and agreement with the client about limited legal services assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer. A lawyer who is providing limited legal services should be careful to avoid acting such that it appears that the lawyer is providing full service to the client. A lawyer who is providing limited legal services should consider how communications from opposing counsel in a matter should be managed. See subrule 6.03(X)

OBA Comment: Acceptable.

Proposed Change 2.02 (6) – Client under a Disability – Commentary

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

OBA Comment: Unacceptable.

The proposed amendment is redundant because it describes the identical duty a lawyer owes to a client who is not under a disability: it adds nothing to the commentary regarding 2.01. In fact, it might provide a basis to argue that the duty to a client under a disability is greater than the duty owed to other clients in this regard - in which case it is worse than redundant.

Proposed Change 2.09 (X)– Withdrawal

A lawyer providing limited legal representation for a client is deemed, upon notice to the client, to have withdrawn for good cause from representation when the lawyer has completed the matter that was the subject of the representation.

OBA Comment: Unacceptable.

As currently worded, subsection (X) goes half way to making limited service agreements a violation of RPC 2.09(1) because completion of the limited retainer is deemed to constitute



withdrawal, without deeming it to be for good cause. The words "for good cause" and "upon notice to the client" should be added as indicated.

In any event, the termination of a limited retainer agreement is not a withdrawal: it is a pre-agreed expiration of a relationship.

Proposed Change 2.09 (X)– Withdrawal – Commentary

Commentary

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

OBA Comment: The first sentence is acceptable. The second sentence should be deleted for the reasons stated below in the OBA Comments on proposed RPC 4.01 and 6.03 below.

If this amendment is considered for adoption at a future date, the OBA would like to have the opportunity to make further comments.

Proposed Change 4.01 (X) Advocacy

Limited Legal Representation

(X) A lawyer acting for a client in a retainer for limited legal representation shall disclose to the tribunal and opposing counsel the scope of the representation for the client.

OBA Comment: Unacceptable.

A requirement that a lawyer acting on a limited service retainer must disclose "the scope" of the retainer, crosses the line into privileged or confidential matters.

Disclosure of such details could harm the client by revealing a weakness of resources, and tipping that party's hand.



The legitimate need of an opposing counsel to know the matters on which s/he can deal directly with a party who has retained a lawyer to provide limited services, can be dealt with in another way. See OBA Comments on RPC 6.03 below.

If this amendment is considered for adoption at a future date, the OBA would like to have the opportunity to comment further then.

Proposed Change 6.03(X) – Responsibility -

Option 1:

Communications with a represented person

(7) Subject to subrules (X) and (8), if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner,

(a) approach or communicate or deal with the person on the matter, or

(b) attempt to negotiate or compromise the matter directly with the person.

Limited Legal Representation

(X) Subject to subrule (8), where a person is receiving limited legal representation from a legal practitioner on a particular matter, a lawyer may, without the consent of the legal practitioner,

(c) approach, communicate or deal with the person on the matter, or

(d) attempt to negotiate or compromise the matter directly with the person,

unless the lawyer receives written notice of the limited legal representation.

Second Opinions

(8) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

[Amended - June 2009]

Option 2:

Communications with a represented person

(7) Subject to subrules (X) and (8), if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner,

(a) approach or communicate or deal with the person on the matter, or

(b) attempt to negotiate or compromise the matter directly with the person.

Limited Legal Representation

(X) Subject to subrule (8), a lawyer acting in a matter for a person in a retainer for limited legal representation shall, based on instructions from the person, notify in writing as soon as reasonably practicable the opposing legal practitioner in the matter that he or she is to



communicate, negotiate or otherwise deal with the lawyer on the matter to the extent of the representation as disclosed in the notice.

Commentary

The legal practitioner may communicate with the person on matters outside of the limited legal representation.

OBA Comment: Both unacceptable.

The proposal to require written notices of limited legal representation is fraught with difficulty including the timing of the delivery, the detail required in it, service and inevitably increased cost for the client.

The simplest way to give protection and guidance to a lawyer as to communicating with an opposing party is to repeat the principle that a lawyer may not communicate with a person on matters on which the person is receiving limited legal representation, and leave it up to that lawyer to enquire about the extent of that representation. Lawyers are used to doing this today: they ask an opposing party if they are represented or intend to be, and have no further communications with the person unless the answer is clear, informed and in the negative.

One solution might be to make subsections 7(a) and (b) subject to the language in the proposed commentary in Option 2, e.g.:

(7) Subject to (c) and subsection (8):.....

(a)...

(b)...

(c) The legal practitioner may communicate with the person on matters outside of the limited legal representation

Proposed Change 6.03(X) – Responsibility, Option 1 Commentary

Commentary

~~Where notice as described in subrule (X) has been provided to a lawyer for an opposing party, The lawyer is required to communicate with the legal practitioner who is providing the person with the limited legal representation, but only to the extent of the limited~~



representation as identified by the legal practitioner. The lawyer may communicate with the person on matters outside of the limited legal representation.

OBA Comment: Acceptable if the first line is deleted as indicated. The contemplated notice is inappropriate for the reasons outlined above.



Participants

Ara Arzumanian

Steven Benmore

Morris Chochla (co-chair)

Nadia Dalimonte

Marshall Drukarsh

Anne Freed

Mark Geiger

Christi Hunter

Jae-Yon Jung

Kenning Marchant

Peter Moffatt

Marcia Oliver

John O'Sullivan (co-chair)

Aaron Platt

Michelle Simard

Shireen Sondhi

Kate Waters

Charles Wiebe