



The Law Society of
Upper Canada | Barreau
du Haut-Canada

“Unbundling” of Legal Services and Limited Legal Representation

Background Information and Proposed Amendments to Professional Conduct Rules

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“UNBUNDLING” OF LEGAL SERVICES AND LIMITED LEGAL REPRESENTATION

Introduction

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 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.¹

The Law Society acknowledges that unbundling in the litigation context is occurring in Ontario. The issue for the Law Society is the lack of on-point guidance in rules of conduct. The Law Society’s Professional Regulation Committee formed a working group that includes representatives from the Paralegal Standing Committee and the Access to Justice Committee to determine what might be done by way of ethical guidance for lawyers and paralegals when they provide limited legal representation.

As a result of the working group’s review, this document includes proposals for amendments to the lawyers’ and paralegals’ professional conduct rules, with explanatory text and some background information on the development of ethical guidance elsewhere on unbundled legal services. For reference, **Appendices 1 and 2** include the text only of the proposed rule/commentary/guideline amendments for lawyers and paralegals, respectively (changes are underlined).

The Law Society also notes that, procedurally, there are no specific rules for the situations in which unbundled services may be provided in a litigation setting. This is the subject of a separate review by the working group and is not part of this call for input.

Some Background on Developments in Other Jurisdictions

United States

¹ The Law Society’s examination of this issue has led to amendments to the conflicts rules applicable to lawyers participating in PBLO programs for brief services in the Small Claims Court and the Superior Court of Justice.

The thinking around and use of unbundling and limited retainers is far more developed in the United States than in Canada. This is no doubt in response to the huge growth in the numbers of self-represented litigants in US courts.²

Much has been published in the US, and the American Bar Association has devoted several web pages to an extensive list of reports, rules, opinions and cases from many states related to provision of short term or limited legal services. Some states have rules of conduct that address limited retainers.

Early on, the US literature isolated some key issues around the unbundling of legal services, in the litigation setting. A report³ from 2000 summed up the issues as follows:

The primary criticisms of unbundling fall into three broad classifications – concern that courts and judges might be misled, concern that clients might be misled, and concern that clients might make mistakes.

A recent publication (November 2009) provides a comprehensive overview of what has occurred in the US on the rule-making front since 2000. The paper, *An Analysis Of Rules That Enable Lawyers To Serve Pro Se Litigants A White Paper*, by the ABA Standing Committee on the Delivery of Legal Services discusses the developments in a number of states where rules have been adopted for this purpose. Some have made amendments to both conduct and procedural (court) rules to co-ordinate and harmonize the ethical and procedural responsibilities on the part of counsel, and to provide clearer advice on how these services are to be offered.

Canadian Bar Association

Several years ago, the Canadian Bar Association (CBA) looked at the issue of unbundling and devoted a chapter to it in its August 2000 report, “The Future of the Legal Profession: The Challenge of Change.” The CBA suggests that unbundling was already, at that time, beginning to appear in the area of family law. The report identifies some of the practical and ethical concerns related to unbundling.

The major concern identified by the CBA is that lawyers will be acting for clients based on inadequate information, which may lead to worse results for the client and complaints or negligence claims against the lawyer. Ultimately, the CBA concluded that the basis for a lawyer's liability or failure in any ethical duty in these circumstances is unclear, and that “most

² One US paper, noted later in this report, says that *pro se* representation in family law courts “is no longer a matter of growth, but rather a status at a saturated level.”

³ “Unbundled Legal Services”, Forrest Mosten and Lee Borden (as presented at the Academy of Family Mediators 2000). This report was also found on the Law Society of Alberta’s website.

ethical duties which talk about a lawyer's obligation to advise clients presuppose that the lawyer has been retained to handle the whole matter."

The report also commented on rules in the CBA's *Code of Professional Conduct*, which includes rules similar to those of the Law Society on the subject of competence.⁴ The CBA said that such rules could be interpreted to mean that the lawyer is obligated to offer well-informed advice, but could also be interpreted to mean that the lawyer and client can agree that the lawyer's role is limited and the advice based on incomplete information.

The report concludes by saying that if the concerns can be adequately addressed, unbundling could become a useful approach in the future.

Law Society of British Columbia

More recently, the Law Society of British Columbia undertook a study of this issue and in 2008 published a comprehensive report⁵ with a series of recommendations on various aspects of the delivery of unbundled services. The study considered the following issues:

1. the impact on the solicitor-client relationship;
2. the duties of a lawyer in these circumstances;
3. the form of disclosure a lawyer makes to a client, to the courts and to the party or lawyer on the other side;
4. the idea of a written retainer agreement;
5. the duties of the client;
6. the impact on liability and insurance; and
7. possible rule revisions.

The report's executive summary says that the development is linked to rise of greater self-representation by litigants:

For some litigants self-representation is a conscious choice. For many, it is a necessity. There are a number of factors that contribute to the rise in the number of self-represented litigants, and the range of causes for the rise in self-representation suggest that there is not a simple solution to the phenomenon.

For those who choose to self-represent, they might be able to afford a lawyer for full service representation, or they might only be able to afford one at a cost that

⁴ "The lawyer should clearly indicate the facts, circumstances and assumptions upon which the lawyer's opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications."

⁵ Report Of The Unbundling Of Legal Services Task Force - Limited Retainers: Professionalism And Practice, April 4, 2008

is beyond what they are willing to pay in pursuing or defending a claim. For these individuals, limited scope legal services present a mid-way option between full service representation and no representation.

...[P]art of the rise in self-representation reflects a cultural shift that is taking place in the information age. The Internet and related technologies are transforming the way information is collected, disseminated, and used. Legal information is now easily available to those with access to the Internet. ...Many of these litigants will not see the value in hiring a lawyer to collect and process information they might easily collect themselves. Some will feel they need little or no help from a lawyer when it comes time to advance their case in court. Limited scope legal services provide an opportunity for lawyers to assist this growing demographic in synthesizing information and refining legal arguments. In short, the regulation of limited scope legal services demonstrates the adaptation of the legal profession to an evolving marketplace.

The report also recognized the reality that lawyers performing solicitor's work have been providing limited scope services for years. While much of the literature on unbundling focuses on litigation services, the report opines that a review of this subject need not be narrowly focused, and that proposals for changes should apply to all applicable areas of practice.

The report's recommendations were extensive, and included the following:

1. Rules that govern professional conduct and procedure before the courts should be amended as required to facilitate the proper, ethical provision of limited scope legal services.
2. Amendments to the ethical rules for guidance for limited scope legal services should not create a lesser standard of professional responsibility than is otherwise expected of a lawyer.
3. If the lawyer does not feel the professional services contemplated by the limited retainer can be performed in a competent and ethical manner, the lawyer should decline the retainer.
4. The lawyer should ensure the client understands the limited scope of the retainer, the limits and risks associated with such services, and should confirm this understanding, where reasonably possible, in writing.
 - a. Example: counsel may enter into an agreement with an accused person to act at trial only, and not to act for the accused in any procedural matters leading up to the trial. Counsel would have an obligation to explain to the client any risks that a limited retainer of this nature might carry for the client.
5. A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.

6. Unless otherwise required by law or a court, the discretion to divulge the identity of the lawyer who provided drafting assistance should lie with the client.
7. A lawyer may communicate directly with a client who has retained another lawyer to provide limited scope legal services, except if all three of the following factors exist:
 - a. The lawyer has been notified of the limited scope lawyer's involvement;
 - b. The communication concerns an issue within the scope of the limited scope lawyer's involvement; and
 - c. The limited scope lawyer or his or her client has asked the lawyer to communicate with the limited scope lawyer about the issue in question.
8. Save as described in the rules for court-annexed and non-profit legal clinic programs (similar to the Law Society of Upper Canada's new conflicts rules for PBLO brief services retainers), the regular rules governing conflicts of interest and duty of loyalty should apply to limited scope legal service retainers.

Canadian Law Societies' Rules of Conduct on Unbundling

The Law Societies of Alberta and British Columbia (prior to its 2008 report) and the Nova Scotia Barristers' Society have addressed unbundling of legal services directly or indirectly in their codes of professional conduct.

British Columbia

British Columbia's Rule 10 in Chapter 10 (Withdrawal) of its Professional Conduct Handbook reads:

Limited retainer

10. A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.

After the 2008 report was adopted, the underlined text was added to the Rules:

Annotations

Rule 10 - Limited retainer

There is no necessary conflict between Rule 10 and the Criminal CaseFlow Management Rules, which seem to require the presence of counsel at certain procedural stages of criminal proceedings. It is proper for counsel to enter into an agreement with an accused person to act at trial only, and not to act for the accused in any procedural matters leading up to the trial. Of course, counsel would have an obligation to explain to the client any risks that a limited retainer of this nature might carry for the client.

[EC November 30, 2000 item 9](#)

It is not inconsistent with Rule 10 for a lawyer to provide anonymous drafting assistance to a client.

Recommendation 8 of [Report of Unbundling of Legal Services Task Force](#) p. 22; approved by Benchers April 2008

Failing to provide information to an unrepresented party about the limitations of the retainer does not amount to professional misconduct.

[DCD 00-16](#)

Alberta

In Chapter 9 of Alberta's Code of Professional Conduct, dealing with the lawyer as advisor, Rule 2 states that

Except where the client directs otherwise, a lawyer must ascertain all of the facts and law relevant to the lawyer's advice.

Commentary under this rule discusses a lawyer's obligation to be economical and to balance this obligation with the obligation to ascertain all of the facts and law necessary to provide meaningful advice. It suggests a lawyer should consult with the client regarding the scope of investigations and provide an estimate of costs. The Commentary also states:

Occasionally, a client will specifically request that a lawyer provide an opinion or advice based only on limited facts or assumptions or without the benefit of legal research. While it may be proper in some cases to agree, the lawyer must ensure that the client understands the limitations of such advice. Not infrequently, a legal opinion based on limited facts or assumptions will be so restricted and qualified as to be practically worthless. Similarly, advice given without research in an area in which a lawyer lacks knowledge or experience is likely to be unreliable.

Nova Scotia

The Nova Scotia Barristers' Society's Code of Professional Conduct provides commentary that deals expressly with this concept. The Nova Scotia commentary (in the numbered "Application of the Rule" and "Notes") under Rule 3 (Quality of Service) addresses "Limited Retainers". Application 3.12 states as follows:

A lawyer may accept a limited retainer, but in doing so, the lawyer must be honest and candid with the client about the nature, extent, and scope of the work which the lawyer can provide within the means provided by the client. In such circumstances where a lawyer can only provide limited service, the lawyer should ensure that the client fully understands the limitations of the service to be

provided and the risks of the retainer. Discussions with the client concerning limited service should be confirmed in writing. Where a lawyer is providing limited service, the lawyer should be careful to avoid placing him or herself in a position where it appears that the lawyer is providing full service to the client.

The relevant Notes refer to and quote from the CBA report and the Alberta Rules, and say:

A lawyer must therefore carefully assess in each case in which a client desires abbreviated or partial services whether, under the circumstances, it is possible to render those services in a competent manner.....As long as the client is genuinely fully informed about the nature of the arrangement and understands clearly what is given up, it should be possible to provide such services effectively and ethically...

Proposed Amendments to the Law Society of Upper Canada's Rules to Address Unbundling

The issues that require attention and, consequently, enhancements to the rules generally relate to the following:

1. Defining the scope of representation: There is a need for an understanding between the lawyer/paralegal and client about what the lawyer/paralegal will do by way of providing limited legal services;
2. Clarifying communications between counsel and parties: The issue is how the rules around communications with represented parties should be applied, given that the lawyer/paralegal providing limited legal services may not be counsel of record or may not consider himself or herself retained for the purposes of the rule;
3. The lawyer's or paralegal's role in document preparation, including disclosure of such assistance: This relates to whether the court must be advised that the client has counsel for a particular part of the case.

In examining these issues, the guiding principle must be that any amendments to the ethical rules for guidance on unbundled legal services should not create a lesser standard of professional conduct than is otherwise expected of a lawyer or paralegal. As such, any amendments would not create new standards but confirm existing standards with awareness around how they apply in the unbundled context.

The following are proposals for amendments to the lawyers' and paralegals' rules upon which comment is requested. The reference is provided for the lawyers' rules (L) and the paralegals' rules (P). As the Paralegal Rules do not include commentary, where commentary is amended or added to the lawyers' rules, similar language is added to the Paralegal Guidelines that accompany the paralegals' rules.

Some of the proposals relate to procedural matters before a tribunal. These proposals are included for comment but would not be considered for adoption at present. They may be considered at a future date in the event that amendments to procedural rules on the provision of limited legal services are considered appropriate.

Rule 1.03(L)/1.02(P) - Interpretation

A definition of “limited legal services” or “limited legal representation” should be added to the rules, which would be used in applicable rules that follow. The definition would read:

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

The paralegals’ rules also require a new definition, found in the lawyers’ rules, for “legal practitioner,” as this term is used in some of the rules discussed later in this paper. It would read as follows:

“legal practitioner” means a person

- (a) who is a licensee; or
- (b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction; or
- (c) who is not a licensee but is permitted by the Law Society to provide legal services in Ontario.

A housekeeping amendment is needed to this definition in the lawyers’ rules to include paragraph (c) above.

Rule 2.01 - Competence

While the competence rule itself would not appear to require amendment, additional commentary should be added to address competence in the delivery of limited legal services. The following is a proposed addition:

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

Rule 2.02(L) – Quality of Service/Rule 3.02(P) – Advising Clients

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

Limited Legal Services

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

- (a) advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer/paralegal can provide, including, where appropriate, within the means provided by the client, and
- (b) confirm in writing and provide the client with a copy of the agreement between the lawyer/paralegal and the client for the provision of the services.

Commentary

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

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

A lawyer who is providing limited legal services should consider how communications from opposing counsel in a matter should be managed. See rule 6.03(X) [*possible new rule on communicating with represented party in the context of a limited retainer*]

It also appears appropriate to add to the commentary under rule 2.02(6) – Client Under a Disability a statement to the following effect:

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.

Rule 2.09(L)/Rule 3.08(P) – Withdrawal from Representation

The proposed amendment to rule 2.09 provides that the lawyer or paralegal is deemed to have withdrawn once the services provided within the limited retainer are complete. This proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.

The amendment would read as follows:

Limited Legal Representation

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

It would also be appropriate to add commentary to reflect procedural aspects associated with withdrawal. The language may depend on what standard is adopted in any future amendments that may be made to the civil rules. The proposal is as follows:

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

Rule 4.01(L) – The Lawyer as Advocate/Rule 4.01(P) – The Paralegal as Advocate

The proposed amendment to rule 4.01 addresses required disclosure when a lawyer or paralegal appears as advocate for a client in a limited retainer. Similar to Rule 2.09/3.08 above, this proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.

The proposed rule reads:

Limited Legal Representation

4.01(X) A lawyer/paralegal 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.

Rule 6.03 (L) – Responsibility to Lawyers and Others/Rule 4.02(P) – Interviewing Witnesses

A key issue in the unbundled context relates to communications with opposing counsel when a party is only represented for part of a legal matter. The general rule requires the consent of the party's lawyer or paralegal for direct communication by an opposing counsel with that party. In a limited retainer, it would appear appropriate to vary that standard, depending on the nature and stage of the communication.

The current rule is written for instruction to the lawyer or paralegal who wishes to communicate with the party who is represented. In a limited retainer situation, it may be that the rule should be directed to the lawyer or paralegal providing the limited services. As such, two options are provided for comment.

The first option permits an opposing counsel to communicate with the party unless written notice of the party's representation by a lawyer or paralegal is provided to the counsel. At that point, communications must be made through the party's lawyer or paralegal or to the party with his or her lawyer's or paralegal's consent. The following is the proposal:

6.03/4.02(X) Subject to subrule (8)⁶, where a person is receiving limited legal representation from a legal practitioner on a particular matter, a lawyer/paralegal may, without 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,

⁶ This subrule deals with second opinions.

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

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.

The second option is to direct the rule to the lawyer or paralegal providing the limited services. The proposal is as follows:

6.03/4.02(X) Subject to subrule (8), a lawyer/paralegal 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 practical the opposing legal practitioner in the matter that he or she is to communicate, negotiate or otherwise deal with the lawyer/paralegal on the matter to the extent of the representation as disclosed in the notice.

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

RULES OF PROFESSIONAL CONDUCT

1.02 DEFINITIONS

1.02 In these rules, unless the context requires otherwise,

...

“legal practitioner” means a person

- (a) who is a licensee; ~~or~~
- (b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction; or
- (c) who is not a licensee but is permitted by the Law Society to provide legal services in Ontario.

“limited legal services” or “limited legal representation” means 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;

...

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

“competent lawyer” means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

- (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,
[Amended – June 2007]
- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,
- (c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,
 - (i) legal research,
 - (ii) analysis,
 - (iii) application of the law to the relevant facts,

- (iv) writing and drafting,
 - (v) negotiation,
 - (vi) alternative dispute resolution,
 - (vii) advocacy, and
 - (viii) problem-solving ability,
- (d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,
- (e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,
- (f) applying intellectual capacity, judgment, and deliberation to all functions,
- (g) complying in letter and in spirit with the Rules of Professional Conduct,
- (h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,
- (i) managing one's practice effectively,
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and
- (k) adapting to changing professional requirements, standards, techniques, and practices.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with legal matters to be undertaken on the client's behalf.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task. The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances, and assumptions upon which an opinion is based. Unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the lawyer should so state in the opinion.

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

A lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must be particularly alert to ensure that the client understands that he or she is receiving legal advice from a lawyer supplemented by the services of a non-licensure. If other advice or service is sought from non-licensure members of the firm, it must be sought and provided independently of and outside the scope of the retainer for the provision of legal services and will be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices. In particular, the lawyer should ensure that such advice or service of non-licensurees is provided from a location separate from the premises of the multi-discipline practice.

Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.

The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[Amended - June 2009]

2.02 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

(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.

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) [possible new rule on communicating with a represented party in the context of a limited retainer]

...

Client Under a Disability

(6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

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.

...

2.09 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

...

Limited Legal Representation

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

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.

[Note: This proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.]

...

4.01 THE LAWYER AS ADVOCATE

Advocacy

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

...

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.

[Note: This proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.]

...

6.03 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

6.03 (1) A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

...

2 options

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.

[Amended – June 2009]

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]

Commentary

Subrule (7) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other legal practitioner by closing his or her eyes to the obvious.

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.

Subrule (8) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

[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.

[Amended – June 2009]

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.

**PARALEGAL RULES OF CONDUCT
AND PARALEGAL GUIDELINES**

**‘LIMITED’ LEGAL SERVICES
AMENDMENTS TO PARALEGAL RULES OF CONDUCT**
Amendments are shown underlined
Other provisions are shown for purposes of context

Rule 1 – Citation and Interpretation

1.02 Interpretation

Definitions

“legal practitioner” means a person

- (a) who is a licensee;
- (b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction; or
- (c) who is not a licensee but who is permitted by the Law Society to provide legal services in Ontario.

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

3.02 Advising Clients

General

3.02 (1) A paralegal shall be honest and candid when advising clients.

(2) A paralegal shall not undertake or provide advice with respect to a matter that is outside his or her permissible scope of practice.

Limited Legal Services

(16) Before providing limited legal services to a client, the paralegal shall

- (a) advise the client honestly and candidly about the nature, extent and scope of the services that the paralegal can provide, including, where appropriate, within the means provided by the client, and
- (b) confirm in writing and provide the client with a copy of the agreement between the paralegal and the client for the provision of the services.

3.08 Withdrawal from Representation

Withdrawal from Representation

3.08 (1) A paralegal shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

...

Limited Legal Representation

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

[Note: This proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.]

4.01 The Paralegal as Advocate

Duty to Clients, Tribunals and Others

4.01 (1) When acting as an advocate, the paralegal shall represent the client resolutely and honourably within the limits of the law while, at the same time, treating the tribunal and other licensees with candour, fairness, courtesy and respect.

(x) A paralegal acting for a client in a retainer for limited legal representation shall disclose to the tribunal and the opposing legal practitioner the scope of his or her representation of the client.

[Note: This proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.]

4.02 Interviewing Witnesses

Interviewing Witnesses

4.02 (1) Subject to subrules (2) and (3), a paralegal may seek information from any potential witness, whether under subpoena or not, but shall disclose the paralegal's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

(2) A paralegal shall not approach or deal with a person who is represented by another licensee, except through or with the consent of that licensee.

7.01 Courtesy and Good Faith

(6) A paralegal shall not communicate with or attempt to negotiate or compromise a matter directly with any person who is represented by another licensee, except with the consent of that licensee.

(7) If a person is receiving limited legal representation from a legal practitioner on a particular matter, a paralegal may, without 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,

unless the paralegal receives written notice of the limited legal representation

OR

(7) A paralegal 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 practical the opposing legal practitioner in the matter that he or she is to communicate, negotiate or otherwise deal with the paralegal on the matter to the extent of the representation as disclosed in the notice.

‘LIMITED’ LEGAL SERVICES
AMENDMENTS TO PARALEGAL GUIDELINES
Amendments are shown underlined
Other provisions are shown for purposes of context

GUIDELINE 6: COMPETENCE

General

1. A licensed paralegal is held out to be knowledgeable, skilled and capable in his or her permissible area of practice. A client hires a legal service provider because the client does not have the knowledge and skill to deal with the legal system on his or her own. When a client hires a paralegal, the client expects that the paralegal is competent and has the ability to properly deal with the client's case.

Limited Legal Services

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

Cross reference Rule 3.02x – new rule

The Required Standard of Competence

Rule Reference: Rule 3.01(1), Rule 3.01(4)

Knowledge

Rule Reference: Rule 3.01(4), (a) & (b)

2. The competent paralegal will ensure that only after all necessary information has been gathered, reviewed and considered does he or she advise the client as to the course(s) of action that will most likely meet the client's goals, taking care to ensure that the client is made aware of all foreseeable risks and/or costs associated with the course(s) of action.
- 2.1 Unless the client instructs otherwise, the paralegal should investigate the matter in sufficient detail to be able to express an opinion, even where the paralegal has been retained to provide limited legal services. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the paralegal should so state in the opinion.

Client Service and Communication

Rule Reference: Rule 3.01(4)(d), (e), (f) & (g)

3. Client service is an important part of competence. Most of the complaints received by the Law Society relate to client service, such as not communicating with a client, delay, not following client instructions and not doing what the paralegal or lawyer was retained to do.
4. Rule 3.01(4) contains important requirements for paralegal-client communication and service. In addition to those requirements, a paralegal can provide more effective client service by
 - keeping the client informed regarding his or her matter, through all stages of the matter and concerning all aspects of the matter,
 - managing client expectations by clearly establishing with the client what the paralegal will do or accomplish and at what cost, and
 - being clear about what the client expects, both at the beginning of the retainer and throughout the retainer.

4.1 Where a paralegal is retained to provide limited legal services to a client, it is very important to clearly identify the scope of the retainer, such as identifying the services that the paralegal will and will not be providing to the client. It is advisable that the limits of the paralegal's retainer are clearly stated in a written retainer agreement.

GUIDELINE 7: ADVISING CLIENTS

General

Rule Reference: 3.02(1) & (2)

1. A paralegal must honestly and candidly advise the client regarding the law and the client's options, possible outcomes and risks of his or her matter, so that the client is able to make informed decisions and give the paralegal appropriate instructions regarding the case. Fulfillment of this professional responsibility may require a difficult but necessary conversation with a client and/or delivery of bad news. It can be helpful for advice that is not well-received by the client to be given or confirmed by the paralegal in writing.

When advising a client, a paralegal

- should explain to and obtain agreement from the client about what legal services the paralegal will provide and at what cost. Subject to any specific instructions or agreement, the client does not direct every step taken in a matter. Many decisions made in carrying out the delivery of legal services are the responsibility of the paralegal, not the client, as they require the exercise of professional judgment. However, the paralegal and the client should agree on the specific client goals to be met as a result of the retainer. This conversation is particularly important in the circumstances of a retainer to provide limited legal services.
- should explain to the client under what circumstances he or she may not be able to follow the client's instructions (for example, where the instructions would cause the paralegal to violate the *Rules*).
- should ensure that clients understand that the paralegal is not a lawyer and should take steps to correct any misapprehension on the part of a client, or prospective client.

Client Under a Disability

Rule Reference: Rule 3.02(7), (8), Rule 2.03

8. A paralegal must be particularly sensitive to the individual needs of a client under a disability. The paralegal should maintain a good professional relationship with the client, even if the client's ability to make decisions is impaired because of minority, mental disability or some other reason. The paralegal should also be aware of his or her duty to accommodate a client with a disability.

8.1 A paralegal 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.

GUIDELINE 11: WITHDRAWAL FROM REPRESENTATION

General

Rule Reference: **Rule 3.08**

...

Written Confirmation

16. If a paralegal's services are terminated while the client's matter is ongoing and the client requests that the matter be transferred to a new paralegal or lawyer, the paralegal should confirm, in writing, the termination of the retainer. The paralegal should also obtain a ***direction***, signed by the client, for release of the client's file to a successor paralegal or lawyer. A ***direction*** is a written document instructing the paralegal to release the file to the successor paralegal or lawyer. If the file will be collected by the client personally, the paralegal should obtain a written acknowledgement signed by the client, confirming that the client has received the file.

Limited Legal Representation

17. Upon completion of a limited retainer, the paralegal 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 the opposing legal practitioner.

[Note: This proposal is included for comment but would not be considered for adoption at present. It may be considered at a future date in the event that amendments to procedural rules on appearances for the provision of limited legal services are considered appropriate.]

GUIDELINE 14: RETAINERS

General

1. In the context of providing legal services, the word *retainer* may mean any or all of the following:
 - the client's act of hiring the paralegal to provide legal services (i.e., a *retainer*),
 - the contract that outlines the legal services the paralegal will provide to the client and the fees and disbursements and HST to be paid by the client (i.e., a *retainer agreement*), or
 - monies paid by the client to the paralegal in advance to secure his or her services in the near future and against which future fees will be charged (i.e., a *money retainer*).

The Retainer Agreement

Rule Reference: **Rule 5.01(1)**

2. Once the paralegal has been hired by a client for a particular matter, it is advisable that the paralegal discuss with the client two essential terms of the paralegal's retainer by the client: the scope of the legal services to be provided and the anticipated cost of those services. The paralegal should ensure that the client clearly understands what legal services the paralegal is undertaking to provide. It is helpful for both the paralegal and client to confirm this understanding in writing by
 - a written retainer agreement signed by the client,
 - an engagement letter from the paralegal, or
 - a confirming memo to the client (sent by mail, e-mail or fax).

2.1 A written retainer agreement is particularly helpful in the circumstances of a retainer to provide limited legal services.

3. This written confirmation should set out the scope of legal services to be provided and describe how fees, disbursements and HST will be charged (see Guideline 13: Fees).

GUIDELINE 17: DUTY TO PARALEGALS, LAWYERS AND OTHERS

General

Rule Reference: Rule 2.01(3) Rule 7.01

1. Discourteous and uncivil behaviour between paralegals or between a paralegal and a lawyer will lessen the public's respect for the administration of justice and may harm the clients' interests. Any ill feeling that may exist between parties, particularly during adversarial proceedings, should never be allowed to influence paralegals or lawyers in their conduct and demeanour toward each other or the parties. Hostility or conflict between representatives may impair their ability to focus on their respective clients' interests and to have matters resolved without undue delay or cost.

Prohibited Conduct

Rule Reference: Rule 7.01

2. The presence of personal animosity between paralegals or between a paralegal and a lawyer involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. To that end, Rule 7.01 outlines various types of conduct that are specifically prohibited.
3. One of the prohibitions in Rule 7.01(1) refers to sharp practice. Sharp practice occurs when a paralegal obtains, or tries to obtain, an advantage for the paralegal or client(s), by using dishonourable means. This would include, for example, lying to another paralegal or a lawyer, trying to trick another paralegal or a lawyer into doing something or making an oral promise to another paralegal or lawyer with the intention of reneging on the promise later. As another example, if an opposing paralegal were under a mistaken belief about the date of an upcoming trial, a paralegal would be obligated to tell the opposing representative about the error, rather than ignoring the matter in the hope the opposing representative would not appear at the trial.

Limited Legal Services

- 3.1 Where notice as described in subrule (7) has been provided to a lawyer for an opposing party, the paralegal 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 paralegal may communicate with the person on matters outside of the limited legal representation.

OR

The legal practitioner who receives notice described in subrule (7) may communicate with the person on matters outside of the limited legal representation.