LIMITED SCOPE RETAINERS

STANDARD:

A lawyer who enters into a limited scope retainer with a client must confirm the nature, extent, and scope of the retainer with the client in writing, including the proposed fee\(^1\).

FOOTNOTE:

1. Nova Scotia Barristers’ Society, *Code of Professional Conduct*, Halifax; Nova Scotia Barristers’ Society, 2012, ch 3-7.1A. Note, that this Standard is not intended to apply to short-term summary legal services, as defined in ch. 3-4.2A.

ADDITIONAL COMMENTARY

A limited scope retainer means the provision of legal services for part, but not all, of a client’s legal matter by agreement with the client.\(^1\) This is also sometimes known as de-bundling of legal services.

In considering whether, and how, to render services under a limited scope retainer, the lawyer should consider the factors relevant to the retainer, which may include such things as:

(a) The nature and urgency of the legal work sought by the client;
(b) The nature of the decision maker (such as a Court, Tribunal, Arbitrator or Mediator)
(c) The status and particulars of any adverse or related party, including whether there is other Counsel involved
(d) The nature and importance of the problem at issue;
(e) The availability of alternate resources to the client;
(f) The scope of what a normal full-service retainer would involve, and the extent to which the client seeks to “de-bundle” the engagement from that full-service retainer;
(g) Whether, and to what extent, other counsel or professionals are involved in rendering other services to the client;
(h) The lawyer’s ability to engage in the limited scope retainer without negatively affecting the client’s legal rights or overall position in the matter or transaction;
(i) The expectations, sophistication and means of the client, and any disability of the client;
(j) Any pertinent orders or directions by competent authorities, such as Courts and tribunals;
(k) The stage of development of the matter under consideration;
(l) Real or potential conflicts of interest;
(m) The competence of the lawyer to handle the scope of the matter under consideration;
(n) Relevant substantive law, including the Code of Professional Conduct, applicable professional standards, duties to the Court and other counsel, and whether there are matters out of which the lawyer and client cannot contract.²

PRACTICE NOTES:

Introduction

Limited Scope Retainers (“LSRs”) have existed for many years. Lawyers have acted as local agents for other counsel, or have been seconded for specialty work or specific projects, without difficulty, for decades. It is only in recent years, however, that the formal “de-bundling” of legal services has become an issue for lawyers and clients alike. This commentary sets forth some best practices as well as pitfalls to avoid when considering LSRs.

The Code of Professional Conduct defines an LSR as “the provision of legal services for part, but not all, of a client’s legal matter by agreement with the client.”³ There are many variations, but can broadly be broken down into consultation, document preparation, and limited representation. Some examples may include:

- The litigator who is retained to draft, or review, a brief, pleadings or documents but not be on the record (“ghostwriting”);
- An engagement to examine a witness either in chief or on cross examination, or to appear on an application, arraignment, bail hearing, sentencing, or other discrete step in a proceeding, but not otherwise be on the record
- Advice on a specialized aspect of a transaction, such as tax implications or regulatory implications
- Advice on the desirability of a proposed settlement or transaction, including independent legal advice on an agreement
- An engagement to draft a Deed or convey a property but not otherwise be engaged in the handling of funds or to advise on the advisability or impact of the transaction
- Attestation or witnessing (particularly, to notarize or attest the execution as a barrister/commissioner) a document but without advice on its nature or effect
- Initial or limited consultation on a matter, such as to determine one’s legal rights or merits of a position, or on a technical issue or step in a matter
- Providing technical or logistical assistance to a self-represented party, such as document assembly, electronic discovery, and the like

While the nature and scope of LSRs will vary enormously by client and subject matter, they may broadly be categorized into four types:

1. Those which are both permitted and are desirable both from the perspective of the specific engagement at hand, and from the broader objectives of access to justice and achieving the desired client outcome;
2. Those which are permitted and while perfectly in order as between lawyer and client, require a careful and prudent understanding of the scope of the engagement and on what payment terms;
3. Those which, while permitted, should be reviewed with circumspection and, if entered into, must be carefully qualified in detail and in writing; and
4. Those which, while perhaps sought and desired by the client, must be refused on legal and ethical grounds.

The Ethical Framework

As with any engagement, the Code of Professional Conduct is the ultimate guide to the governing principles. It is important to remember that the fact a proposed retainer is for “less than full” services does not relieve the lawyer from all of the same ethical obligations as with any other engagement, including

- Competence
- Candour
- Compliance with all relevant directions such as Court orders
- Compliance with mandatory professional standards enacted by the Society (such as those applicable to Real Estate or Family Lawyers)
- Confidentiality
- Conflicts of interest
- Clarity on the scope and nature of the retainer.

The Code also sets out, in some detail, additional rules pertaining to LSRs. After defining an LSR in 1.1-1(i) as “the provision of legal services for part, but not all, of a client's legal matter by agreement with the client”, the Code sets out specific rules in sections 3.1-2, 3.1-2A, 7.1., and 7.2-6A.

Why LSRs?

Although this Standard and commentary attempts to point out limitations and pitfalls to LSRs, both conventional and otherwise, they have a significant role in appropriate cases particularly, but not limited to, the litigation context. The advent of the internet, the explosion of self-represented litigants, the increased use of alternate-dispute resolution mechanisms, and the heavy call upon Court and other resources have increased the number and scope of situations in which LSRs can be appropriate and ethical alternatives to full service lawyer client retainer agreements. In addition, society as a whole has an increased awareness of the problem with Access to Justice issues to many individuals and groups. Experience has shown that “some representation is better than no representation.”

For the client of no or limited means, LSRs can ensure access to professional advice of the greatest “utility for the dollar,” which in turn can alert them to theretofore unknown issues or pitfalls; turn them towards or away from a course of action; discourage frivolous or prolix activity; save Court time; and, as studies suggest, result in increased client satisfaction and, for the lawyer, an increased rate of recovery on fees billed.
In "Limited Scope Legal Services: Unbundling and the Self-Help Client," the ABA identified varied reasons, not all of them economic, that the public may seek an LSR:

1. They like to control their legal matters and have DIY personalities.
2. They cannot afford to pay for full legal representation.
3. They want the flexibility and convenience that unbundling may give them.
4. They would benefit from alternative fee arrangements, such as the fixed fees and value billing that can accompany unbundled services.
5. They are less intimidated with limited interaction with lawyers than they would be in traditional, full-service law firms or they may be more comfortable with online DIY services using the Internet to communicate and accomplish their business needs rather than making appointments at traditional law offices.
6. They live in remote areas or for other reasons do not have the means to travel to larger cities to visit physical law offices multiple times as often is required in full-service representation.

The Scope and Billing of the LSR

(A) The Retainer

It is important in any engagement to define the scope of the retainer, including events of termination or deemed termination, in writing. This “best practice” becomes critical, and in fact mandatory, in an LSR.

While the exact nature of the engagement will depend on the specific topic and the particular solicitor-client relationship, an LSR retainer agreement, signed by all parties, should at a minimum include:

(a) A statement that it is an LSR and that the lawyer is not engaging in nor advising upon matters beyond the scope of the LSR;
(b) A detailed description of exactly what the lawyer is retained to do;
(c) The fact that there are other issues upon which the client can, and should, obtain independent legal advice or representation, as the case may be;
(d) Who is in charge of filing documents, if applicable, and how disbursements are treated;
(e) Any applicable limitation period, or that advice is not being given on them;
(f) The circumstances in which the engagement is completed, or terminated, or in which the lawyer is entitled to withdraw or is deemed to have been discharged. This may, for example include situations in which the lawyer is engaged for what is expected to be a default or uncontested proceeding though it is in fact opposed. It can and should also contain provisions that the lawyer is discharged or entitled to withdraw where the client does not accept the lawyer’s advice.
(g) How fees are to be calculated, and when they are to be paid
(h) Any disclosure required given the fiduciary nature of the solicitor-client relationship;
(i) Subject to any rules or practice of Court, when the lawyer is to appear on the Record, a direction to disclose to the Court the scope and limit of that engagement;
(j) Provisions for expansion, if such is to be the case, of the LSR

Lawyers, both from a business and liability perspective, should beware of potential “retainer creep.” The lawyer who is asked to “answer a quick question” about a matter outside the scope of the agreed-upon retainer not only risks expanding the business scope of the representation (either with or without compensation) but runs the substantial risk of actionable negligence in the event of an incomplete or inaccurate answer. Preserving the
“four corners” of the LSR also engenders respect for the solicitor-client relationship and the value of the legal services engaged and agreed to be paid for.20

The lawyer who does not take care in the retainer clearly to specify what is and is not within the scope of the engagement will likely have any ambiguity construed against the lawyer.21

The lawyer should also be especially careful to document what information and documents are provided by the client, particularly if the subject of the LSR is either “midstream” or conclusive to the matter at hand. For example, the lawyer who is called upon to give a recommendation on a proposed settlement and who is provided with only part of the file is not in a position to provide a competent evaluation on the merits.

The LIANS website, as well as resource materials referred to in the bibliography, contain several useful checklists; in particular, the “who does what” treatment of steps in a transaction or proceeding is useful in removing ambiguity or later disagreement.22

(B) Fees and Billing the LSR Client

The general law applicable to solicitor-client fees apply to LSRs.23

It is perhaps more common to engage in fixed-fee, paid-in-advance fee arrangements with LSRs than in other engagements on similar topics, in which the time spent or skills called upon are less predictable.24 This can not only provide certainty to the client who is seeking justice at a predicable cost, but marketing opportunities for the firm.

(C) Non-Waivable Aspects of the LSRs

As noted above, a lawyer cannot contract out of the Code or applicable Professional Standards.

Not every fact situation will lend itself to an LSR, despite perhaps the wishes of the potential client. Serious or complicated matters may require full and traditional legal services, or be of such a nature that the mandatory scope of the representation makes an LSR either inadvisable or downright impracticable.25

In the case of a client under disability, it may not be possible to limit, or obtain informed consent to limit, the scope of the representation.26

Marketing LSRs

The growing market for LSRs provides both opportunities and pitfalls in marketing those potential services.27

As always, the substantive law, including the Code, applies to marketing legal services. Specifically, lawyers should pay particular attention to advertising fees (they bind the lawyer and the firm) and the prohibition upon modifiers such as “simple,” “and up,” and the like.28

If using a website or interactive online presence, the lawyer should distinguish between information and advice; in the event of the latter, the same substantive law applies as in face-to-face situations.29
ENDNOTES

1 Code, 1.1-1(i)

2 The Office of the Syndic of the Barreau du Quebec puts it succinctly: “The [office] also wishes to underline that a lawyer cannot contractually limit the scope of his/her ethical obligations, either toward the client or anyone else.” Barreau de Montreal, A Lawyer’s Guide to Limited Scope Representation, p. 2

3 Code, 1.1-1(i)

4 As set out throughout this commentary, the LSR does not change the substantive law applicable to the solicitor-client relationship or the lawyer’s ethical obligations. While much has been written in other jurisdictions about the ethics of ghostwriting and the level of disclosure required, there appears to be no specific Canadian prohibitions or restrictions on ghostwriting that would not apply to documents issued over the lawyer’s own signature. In other words, if a lawyer shouldn’t issue an instrument with their signature attached or take a course of action under their own name, they should not write it, or counsel a position or strategy for issuance under someone else’s.

5 For example, under s. 486.3 of the Criminal Code, there are situations in which a self-represented litigant cannot cross-examine a witness.

6 As of writing, Real Estate Standards is working on, but has not yet issued, a specific standard on this point. That standard will prevail to the extent of any inconsistency.

7 Nothing in this Standard or commentary precludes appropriate “pro bono” retainers, either on a full service or permitted LSR basis.

8 See for example, Limited Representation Committee of the California Commission on Access to Justice, Report on Limited Scope Legal Assistance with Initial Recommendations 11 (October 2001), pp. 10-11. As cited in American Bar Association, “Handbook on Limited Scope Legal Assistance” (2003, American Bar Association), p. 144 (hereinafter “ABA Report”): “[w]e agree with a number of judges who conclude that ‘it is usually very clear’ to a trial judge ‘when a litigant has received some legal assistance,’ and it is better that ‘litigants receive some help, rather than none.’”

9 See, for example, Macfarlane, Dr. Julie, “Getting the Public and the Profession on the Same Page About Unbundled Legal Services” in CBA report http://www.cba-alberta.org/Publications/Handbooks-and-Reports/Limited-Scope-Retainers.aspx p. 20 at 22.


12 Limited Scope Legal Services, supra, p. 10

13 In certain circumstances, it may be appropriate to include this as a separate document, so as to enable its filing with a Court or applicable third parties without disclosing more information than necessary.

14 In particular, see the Family Law Standard #11 – Scope of Representation.
15 As with general-representation situations, a distinction must be made between instructions which the lawyer cannot accept for substantive reasons, and those which, after informed consent (in writing), the client elects upon a course of conduct or instructions to counsel which is permissible but not recommended by the lawyer. As by definition a lawyer in an LSR is not handling all aspects of the matter, this is an area especially prone to error. You should also include a statement if you have recommended being retained for a particular aspect or service and the client has declined to do so.

16 You may also wish to set out “how much of funds received relate to different kinds of work, in case the client may go bankrupt during work on the file.” – see discussion of bankruptcy issues in Family Law Standards #11: http://www.lians.ca/standards/family-law-standards/11-scope-representation

17 For sample checklists and forms, see http://www.lians.ca/resources/risk-and-practice-management/practice-tools/limited-scope-retainer-resources

18 Although there is no concrete evidence that LSRs have given rise to increased claims or insurance payouts (see Macfarlane, “Listening to the Public”, and indeed some evidence to the contrary (see ABA report, p. 75 et seq.), the very nature of the LSR calls for increased vigilance in ensuring that the lawyer and client are, at all times, on the same page in what the client believes the lawyer is responsible for, and what the lawyer in fact is undertaking to do. See also ABA Report, p. 56.

19 In Poulain v. Iannetti 2015 NSSC 181, a solicitor in a personal injury case was held liable for negligent advice pertaining to a Section B settlement. Although the Court found that the defendant lawyer was NOT retained to handle the Section B claim, he was nevertheless liable in negligence once he had undertaken to give advice pertaining to it.

In “Unbundled Legal Services: Pitfalls to Avoid” (2012: LawPro Magazine, 11:1, pp 7-8, Dan Pinnington lists the following as items to keep in mind in reducing exposure to claims in an LSR:
- Limited scope representation does not mean less competent or lower quality legal services
- Identify the discrete collection of tasks that can be undertaken on a competent basis
- Confirm the scope of the limited retainer in writing
- Clearly document work and communications
- Be careful with communications when opposing counsel is acting on an unbundled basis
- Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems
- Be careful providing further assistance to a client after a limited scope retainer is terminated


21 Trillium Motor World v. General Motors of Canada 2015 ONSC 3824 involved a multi-million dollar claim relating to advice giving to dealers whose GM franchises were being terminated. While currently (2015) on appeal, the decision focuses at para. 462 et seq. on the importance for the scope of the retainer to be defined clearly. At Para. 469-70, the Court stated: [469]  Where a retainer clearly limits the scope of legal services to be provided, a client generally cannot, at a later stage, criticize the lawyer for failing to perform services that fall outside the scope of the retainer.

[470]  On the other hand, where a retainer has not been reduced to writing, a heavy onus is on the lawyer to show that its version of the scope of the retainer is correct: Griffiths v. Evans, [1953] 2 All E.R. 1364, [1953] 1 W.L.R. 1424 (C.A.); Rye and Partners v. 1041977 Ontario Inc., [2002] O.J. No. 4518

…the onus is on the solicitor who seeks to limit the scope of his/her retainer and where there is ambiguity or doubt it will, generally, be resolved in favour of the client.

22 Footnote 16, supra.

23 See also the LOMC Standard on Retainer and Billing.

24 See Limited Scope Legal Services, Chapter 4.

25 For a discussion of this in the Real Property context, see Winter, Cumming, et al “All I Want is A Deed” (RELANS conference, December 2, 2013), as well as articles in LIANSwers November 2012 and November 2013: http://www.lians.ca/sites/default/files/archived-pdfs/issue_16_-_nov_2012.pdf; and http://www.lians.ca/sites/default/files/archived-pdfs/issue_23_-_nov_2013.pdf. A specific Real Estate Practice standard is in development on the topic. In a litigation context, a serious criminal charge may render “partial representation” nugatory and perhaps be open to challenge on the basis of inadequate or ineffective counsel.

26 See Code 3.2-9: “When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as reasonably possible, maintain a normal lawyer and client relationship.”


28 Regulation 7.6.6 under the Legal Profession Act.

29 Such as the client identification rules and rules on conflicts of interest.

ADDITIONAL RESOURCES

Template letter(s)

Canadian Bar Association, Alberta Branch “The Limited Scope Retainer”

https://www.cba.org/Alberta/main/pdf/limited%20scope%20retainers_FINAL.pdf
Pinnington, Dan: “Unbundled Legal Services: Pitfalls to Avoid.” LawPro Magazine, 11:1 January 2012, p. 6 (available at lawpro.ca/magazinearchives)

Eaton, J. Timothy and Holtermann, David: “Limited Scope Representation is Here” 2010 CBA Record 36