

Ontario's Family Law Limited Scope Services Project
Best Practices Guide
(August 2018)

Introduction

Ontario's Family Law Limited Scope Services Project ("the project") will launch in the fall of 2018 to facilitate the provision of limited scope services in family law disputes by family lawyers, within and outside of the court process.

With limited scope services, the lawyer only does some of the work relating to the family law dispute, as agreed to in advance between the lawyer and the client. The project aims to help separating parents in Ontario find family lawyers in their jurisdictions who will provide the services that the client is seeking on this basis.

In developing this project, the Steering Committee has chosen to use the phrase "limited scope services" to cover **all** situations where a lawyer is hired to assist a client for some but not all of the work normally provided pursuant to a traditional retainer agreement. Limited scope services are often referred to as "unbundled legal services".

This project also supports a developing area of practice that falls within the larger category of limited scope services – legal coaching. Legal coaching often includes behind-the-scenes guidance on both the hard and soft skills of lawyering, as well as the tools needed to pursue the resolution of the client's dispute as effectively as possible in the absence of counsel.

The project's Steering Committee developed this guide to share:

1. New best practices for the provision of limited scope legal services in family cases; and
2. Tools which have either been developed or amended specifically for use in Ontario to support lawyers who provide family law limited scope services.

This guide relies heavily on Nikki Gershbain's 2017 Law Foundation of Ontario funded research which focused on the field of legal coaching. Credit must also be

given to the Institute for the Advancement of the American Legal System (IAALS) for their 2015 toolkits. Reference is made with permission to several helpful resources from British Columbia's Family Law Unbundled Legal Services Project. The Resources Tool Kit is located at the end of this Guide.

Finally, it should be noted that these Best Practices are not intended to either limit or in any way relieve the lawyer from his or her professional responsibilities under the *Rules of Professional Conduct*. While the best practices outlined in this guide may, in some circumstances, assist lawyers in establishing that they have met the necessary standard of practice, lawyers who provide legal services pursuant to a limited scope retainer should ensure that they meet their professional responsibilities at all times.

Overview of Best Practices:

Because a lawyer-client relationship is formed in a limited scope legal services retainer, many if not all of the best practices that family lawyers have developed in full representation retainers also apply in the context of unbundled services.

Limited scope services generally also have a unique set of best practices and depending on the type of limited scope services being provided, there may be even further sub-sets of best practices.

Family lawyers who provide limited scope services should be guided by the following principles, each of which is expanded upon in the section below:

1. Screen for domestic violence to inform your advice to the client regarding the appropriateness of coaching and/or unbundling in the circumstances.
2. Develop additional tools/checklists that will help to inform your client and assist them in taking care of tasks that will remain their responsibility.
3. Stay within areas of family law in which you are knowledgeable. Consider which matter types you handle that are capable of being broken down into separate tasks.

4. Review and revise your client intake forms and process to ensure that you receive information that will help you:
 - a. Identify what specific help the client is seeking;
 - b. Determine whether the client is likely an appropriate recipient of limited scope legal services;
 - c. Provide efficient and effective legal services.
5. Conduct a thorough intake with each client after reviewing their intake form(s). During the meeting, explain to the client what limited scope services are and your assessment of whether the client and the matter are appropriate for the specific limited scope services that they are seeking.
6. Use a retainer agreement that will help you and your client come to a specific agreement regarding the services that you will provide and the payment arrangements that will apply.
7. Ensure good communication with the client throughout your relationship. Remember that limited scope service requires the same careful communication as full service from beginning to end.
8. Document all advice and decisions.
9. Only communicate with the other side in accordance with the scope of your retainer (if you communicate at all with the other side).
10. Do not provide services beyond the scope of the retainer.
11. Despite the limited scope of your retainer, identify for the client, in writing, any collateral issues that come to your attention during the course of your retainer.
12. Document the end of your limited scope retainer services.
13. If your client is involved in litigation:
 - a. Consider whether you are comfortable ghostwriting court documents for the client;
 - b. Comply with your professional obligations as an officer of the court at all times;
 - c. Try to ensure that your assistance helps the client and the court to move the case forward to resolution at all times; and
 - d. Consider whether you are prepared to provide services to a client who is not amenable to moving the case forward to resolution.

Best Practices – Expanded:

Domestic Violence Assessment

- Know how to properly screen for domestic violence.
- Assess whether coaching and/or unbundling is appropriate in the circumstances.
- Assess your own comfort in working with a client at risk of violence and your ability to competently handle the complexities of such a file.
- Understand your obligations when the client is an alleged abuser.
- Be armed with referrals (legal and otherwise) of professionals with expertise in this area. Refer to the domestic violence information in the resource toolkit.
- Always be prepared to assist the client with safety planning when a safety concern arises.

Tools/Checklists

- Develop handouts/worksheets to help your clients:
 - Understand the law, the process in which they are engaged (whether in court proceedings or outside of court) and specific stages of litigation (where applicable).
 - Better understand the issues/tasks that they will remain responsible for and what is expected of them in terms of addressing those issues/tasks within prescribed timelines.
 - Provide you with the information that you need to complete your assigned tasks. For example, preparing a parenting plan worksheet helps you understand your client's preferences for time with the children, and can be used to help prepare either a settlement proposal or conference materials.
- Tailor your client intake forms to obtain information regarding the specific help that the client is seeking.
 - Ensure you and the client are clear on the goals of each meeting/step/event
- Prepare post-meeting and/or step/event checklists that can be provided to a client to help them follow up with any required tasks.

Work Within Your Expertise

- Work within the areas of family law where you have the requisite legal knowledge and skills (e.g. parenting cases, support & property division).
 - Work within your legal skills regarding the process and particular stage of litigation, if applicable.
 - If you are providing coaching services, you may require prior experience both to assess the appropriateness of the client for limited scope services and to properly communicate with and support the client.

Your Intake and Ongoing Process

- Set up your office systems to minimize the time needed for you to get up to speed when your assistance is requested.
- Have clients complete intake forms before your initial meeting so that you can retrieve the key information quickly at the outset.
- Perform a diagnostic interview to discover the critical issues in the case.
- Understand that fact gathering must be an ongoing process.
- Ensure that the client and the matter are appropriate for limited scope services (see *Assess the Client and Matter's Suitability for Limited Scope Services* below).
- Obtain informed consent – explain the pros, cons and risks of limited scope retainers, recommend services and agree on task allocation to the extent appropriate.

Assess the Client and Matter Suitability for Limited Scope Services

- The ideal client for unbundled services likely has high literacy skills and emotional capacity, realistic expectations regarding the likely outcome, time and ability to work independently, the ability to listen and is open to taking direction. They are also attentive to details and learn relatively quickly. The ideal client is confident, open to persuasion and genuinely interested in resolution.

- Clients who should potentially be avoided¹:
 - a person who acts on principle regardless of advice to the contrary
 - a person with unreasonable expectations re: success
 - a person who is always in crisis (whether indicated or not)
 - a person who cannot let go of tasks or delegate and micromanages the lawyers' tasks
 - a person with cognitive or literacy issues and/or significant addiction or mental health issues
 - a person who makes requests for extra help, thereby not respecting either the boundaries in the professional relationship or the retainer
 - a person who has already consulted successive lawyers without good explanation.

- Assess the complexity of the matter and its appropriateness for limited scope services. Do not agree to assist on matters where the client seeks to limit the extent of your assistance beyond what is reasonably necessary in relation to the complexity of the matter.

Your Limited Scope Services Retainer Agreement

- It is essential that your retainer agreement be in writing and that it clearly reflects you will handle certain parts of the matter and that your client will be responsible for the other parts.
- Review the retainer with the client to ensure the client understands and agrees with the limits of your role/responsibilities and the services that you will be providing.
- Amend the retainer or create a new one before additional services are provided. Be alive to limited scope services turning into coaching services and vice versa.
- Obtain specific instructions from the client within the written retainer agreement with respect to the extent to which you can communicate the

¹ Summarized from Toby Rothchild, Executive Director of Legal Aid Foundation of Los Angeles and Wen Yun Chang, malpractice lawyer

limits of your retainer to the court or opposing counsel. Be careful not to inadvertently breach your duty of confidentiality to the client.

- A precedent retainer has been developed for use in this project, based largely on the one that is currently available on LawPro's website. Amend the retainer as is appropriate to reflect the situation and the client's needs.

Communications with the Client

- Ensure that the client understands the limits of your role and of the services that you will be providing throughout the retainer.
- Maintain good communication with the client at all relevant stages in the relationship. Limited scope services typically require more detailed written communication with clients, not less.
- Take comprehensive notes during calls and meetings.
- Avoid miscommunication with the client by documenting rigorously. Keep a written record and copies of all of the information the client has provided

Document Advice and Decisions

- Confirm, in writing, the advice you have given and where appropriate, the decision the client has made
- Document your advice to the client to follow up on any legal matters or tasks beyond the scope of the retainer. Have the client acknowledge having received that advice.
- If you identify additional problems or issues, even if they are outside of the scope of the unbundled retainer, you should identify those issues to your client. Clarify what the issues are and whether or not you will be dealing with them. If not, consider referring your client to other professionals for assistance.
- Save any documents you provided advice on or that you helped to draft or edit.

Communications with the Other Side

- Have clear discussions with your client about who will communicate with the other side (if at all) and about which issues. Make sure that your client

understands that opposing counsel may communicate with them directly about matters outside the scope of your retainer.

- Ensure the retainer agreement is clear with respect to the issues you have authority to communicate with the other side about.
- Have a system in place to deal with situations where the client has also communicated with the other side about an issue which you are tasked with managing.
- Consider having the client review correspondence before sending to the other side (where possible).
- Ensure that your client receives a copy of all correspondence to or from the other side in a timely manner.
- Where responsibility has been divided based on subject matter:
 - Co-ordinate communications with your client to avoid duplication and inconsistent messages; and,
 - Clearly communicate to the other side to whom the response should be directed – you, the client or both.
- Be cautious of a client who is maintaining responsibility for certain issues in order to manipulate the other party or use up his or her resources.

Collateral Issues

- Flag any important issues for the client that you become aware of, regardless of whether or not they are covered in your retainer. This includes any limitation periods that may apply.
- Provide sufficient information to the client about the issue and likely consequences so he or she can make an informed decision about how to address the issue.

Avoid Scope Creep

- Do not provide additional services outside of the scope of the retainer.
- Advise clients of their right/obligation to seek advice on issues outside of the scope of the *limited* retainer.
- Ensure an amended/new retainer is properly executed for new or changed responsibilities.

End of the Retainer

- Confirm with the client in writing when the retainer has been completed.
- Consider whether you should provide notice to the other side the fact that your representation is complete.

Legal Coaching – Additional Considerations

- Establish parameters and set boundaries for clients, both as part of the retainer and in the relationship.
- Ask questions to determine the client's values (as values drive decision-making).
- Remember that this relationship is somewhat unique and that you are teaching, mentoring, and wearing many hats; you are not simply advising.
- Remain non-judgmental.
- Use your emotional intelligence.
- Manage the client's expectations of what both you and they can achieve, given the law, the facts and their budget.
- Create an action plan for each file.
- Use checklists to identify tasks and next steps and ensure the client understands those steps.
- Do not take steps without asking the client's permission – the client is in the driver seat of the coaching relationship in terms of how much and how often they seek your assistance.
- Work with your client to set goals, assign manageable and goal-oriented deliverables ("homework").
- Review deliverables and provide timely feedback.
- Follow up consistently and at key intervals.
- Work to establish trust at each stage.
- Let the client know in writing when the relationship has ended.
- Create a support group of experienced colleagues.

Limited Scope Services in the Litigation Context – Additional Considerations

- Ghostwriting is not prohibited in Ontario under either the Rules of Professional Conduct or the *Family Law Rules*.

- Generally speaking, you should not go on the record if you are assisting the client for only one step in a case.
- If you choose to go on the record, you may have difficulty removing yourself from the record (depending on the stage of the case and timing of your request, particularly if the client no longer agrees to you being removed).
- When agreeing to act as an agent for the client for a specific event at court, seek the client's agreement for you to assist with tasks that arise relating to that event (e.g. preparing an order that arises from a motion).
- Where you have provided advice in relation to a conference but the client is unwilling to retain you to personally attend the conference, consider arranging with the client for you to be available to provide advice during the conference by telephone to minimize the potential for further delay in moving the matter forward to resolution.