

The Law Society of British Columbia



Report of the Unbundling of Legal Services Task Force **LIMITED RETAINERS: PROFESSIONALISM AND PRACTICE**

For: The Benchers
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Purpose of Report: Discussion and Decision

Prepared on behalf of: Unbundling of Legal Services Task Force

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EXECUTIVE SUMMARY

The civil justice reform that is underway in British Columbia and other jurisdictions is spurred, in large part, by the high cost of civil litigation and the delay litigants face in obtaining access to justice. Cost, delay and complexity are often cited as endemic problems in the civil justice system. These problems fuel the rise in self-representation, and the result feeds back into the cause to create a situation Chief Justice McLachlin has described as an “epidemic of lack of representation.”

In response to these concerns, on March 4, 2005 the Unbundling Legal Services Task Force (“Task Force”) was struck. “Unbundling” refers to a situation where a lawyer provides limited scope services to a client, rather than providing full scope legal services. In this Report, we have defined “unbundling” as **“limited scope” legal or litigation services.**

Limited scope litigation services can take many forms, including assisting with the drafting of a document or appearing in court to assist an otherwise self-represented litigant in arguing a particularly nuanced part of a case. From its consultations and research, the Task Force recognized that limited scope legal services are presently being provided in British Columbia. Limited scope legal services have increased over the years, but the rules that govern professional responsibility and the various rules of court have not kept pace with these changes. The challenge is that there are insufficient ethical or procedural guidelines for lawyers providing limited scope legal services, particularly in the litigation context. From both a regulatory and an educational perspective, it is important that guidelines be established to help ensure limited scope legal services are enhancing, and not hindering, access to justice.

Traditionally a client, particularly a litigant, would retain a lawyer for full service representation. This is no longer the case and, increasingly, many litigants are representing themselves before the courts. 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 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. They have enough money to afford some legal assistance, and from a cost/benefit analysis many will see the value in receiving some legal services, whether in the form of drafting assistance, coaching, or a limited appearance.

We must also recognize that part 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. Soon the justice system will be faced with a generation of litigants, the vast majority of whom will be

computer literate and used to collecting and processing information without recourse to an intermediary. It will be a generation that understands information-based services in a very different way than previous generations and has different expectations regarding how those services are to be delivered. 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.

Early in its work the Task Force recognized that solicitors have, for many years, been providing limited scope services without uncertainty regarding how those services might be delivered. Although a limited scope retainer in litigation is different than a limited retainer for solicitors' work, the Task Force believes that solicitors provide an excellent example that limited scope services can be performed ethically and competently. While many of the recommendations in this Report are directed to litigators, the Task Force believes challenges can arise in all areas of practice and that the report has broader application than to barristers alone. The Recommendations are not intended to suggest that solicitors need to modify existing practices that meet the standard of competence and professionalism expected of solicitors and, more generally, of lawyers overall.

This Report describes the environment that has given rise to the need for limited scope legal services, identifies the gaps that exist in ethical and procedural rules, and describes various issues that can arise in the provision of limited scope legal services. The Task Force believes that limited scope legal services can be a valuable tool for enhancing access to justice by allowing people to retain lawyers for discrete services, and in accordance with their means. While limited scope legal services will not stem the rising tide of self-representation before the courts, the Task Force believes that if properly delivered, these services will lead to concrete benefits. First, such services will provide people who cannot afford full service representation with targeted legal assistance that improves their case. Increasing the availability of legal advice and services will enhance access to justice. Second, limited scope legal services can assist the court by better preparing self-represented, or partially represented litigants to advance their case. Third, by presenting only a "full service" or "no service" dichotomy, many lawyers are failing to access and serve a growing market. For some lawyers, the choice not to provide such services stems from uncertainty regarding how limited scope legal services are to be regulated, and whether the courts will respect the limited scope of the retainer, or expect the lawyer to provide services beyond the agreed scope of the retainer.

Where the word "court" has been used in this report, the Task Force intends, where applicable, for the recommendations to apply to matters involving tribunals as well. A lawyer may provide limited scope legal services to a client with regard to a matter before a tribunal, or that is within the jurisdiction of a tribunal to resolve.

The recommendations in this Report are intended to encourage reform that will provide guidelines for the delivery of limited scope legal services, and thereby enhance access to

justice by providing certainty and structure to their provision for clients, lawyers, the courts and the overall community.

SUMMARY OF RECOMMENDATIONS

The recommendations in this report can be categorized as follows:

- ❑ GENERAL PROFESSIONAL CONDUCT
- ❑ CONFIDENTIAL DRAFTING ASSISTANCE
- ❑ COMMUNICATIONS
 - General
 - With Limited Scope Parties
 - With the Courts and Other Parties
 - With the Client
- ❑ CONFLICTS OF INTEREST
- ❑ EDUCATION AND TRANSITION

❑ **GENERAL PROFESSIONAL CONDUCT**

Recommendation 1:

Because limited scope legal services can enhance access to justice for people who will not retain a lawyer for full service representation, 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.

Recommendation 2:

Amendments to the *Professional Conduct Handbook* providing guidelines for limited scope legal services should, as a general rule, not create a lesser standard of professional responsibility than is otherwise expected of a lawyer. While the scope of services may be limited, the lawyer should provide those services to the level expected of a competent lawyer in a similar situation, taking into account the factors set out in the *Professional Conduct Handbook* for professionalism and ethics.

Recommendation 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.

❑ **CONFIDENTIAL DRAFTING ASSISTANCE**

Recommendation 4:

It is not improper for a lawyer to provide confidential drafting assistance to clients. 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.

Recommendation 5:

In order to best assist the client and the court, the lawyer who provides drafting assistance should draft the documents using clear, plain language, and ensure that the client understands the meaning and possible consequences of the documents. The lawyer should also ensure the client understands the limited scope of the retainer, and should confirm this understanding, where reasonably possible, in writing.

Recommendation 6:

The *Rules of Court* should not require a lawyer to file an appearance simply because the lawyer drafted or assisted in drafting documents (ultimately) filed in court.

Recommendation 7:

A lawyer who provides drafting assistance to an otherwise self-represented litigant should be allowed to rely on that litigant’s representation of the facts, unless the lawyer has reason to believe the representations are false or materially insufficient.

□ **COMMUNICATIONS**

General

Recommendation 8:

The Ethics Committee should consider making an annotation or footnote for *Professional Conduct Handbook*, Chapter 10, Rule 10, to make it clear that a lawyer providing anonymous drafting assistance is not inconsistent with the scope and purpose of that rule.

With Limited Scope Parties

Recommendation 9:

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:

1. The lawyer has been notified of the limited scope lawyer’s involvement;
2. The communication concerns an issue within the scope of the limited scope lawyer’s involvement; and
3. 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.

With the Courts or other Litigation Parties

Recommendation 10:

For consistency and certainty the British Columbia Court of Appeal and British Columbia Supreme Court should be asked to draft orders of the court in circumstances the court deems appropriate.

Recommendation 11:

In order to facilitate the delivery of limited scope legal services, new court rules and court forms, drafted in plain and concise language, are required to allow a lawyer providing limited scope legal services to go on and off the record in an expedited manner, thereby communicating the scope of that lawyer's involvement to the court, the court registry and interested parties.

Recommendation 12:

The rules regarding service and delivery of documents should be amended to make it clear when service or delivery on a lawyer who is providing limited scope legal services is permissible.

With the Client

Recommendation 13:

A lawyer who provides limited scope legal services should inform the client about the scope of services and the limits and risks associated with the limited services provided.

□ **CONFLICTS OF INTEREST**

Recommendation 14:

Save as described in Recommendation 15, the regular rules governing conflicts of interest and duty of loyalty should apply to limited scope legal service retainers.

Recommendation 15:

Because the current conflict of interest rules, and rules regarding duty of loyalty, can create impediments to lawyers providing legal services at court-annexed and non-profit legal clinics or programs, and because of the summary nature of those services and the importance of those service for enhancing access to justice, the *Professional Conduct Handbook* should be amended to encompass the following principles:

1. The recommendations for modifying the conflicts of interest rules apply only to circumstances where a lawyer, under the auspices of a program operated by a court or a nonprofit organization, provides short term limited legal services to a client in circumstances where neither the lawyer or client expect that the lawyer will provide continuing representation in the matter (the “Exempted Services”).
2. In circumstances where it is practicable to do so, a lawyer should conduct a conflict of interest search prior to providing Exempted Services;
3. If the lawyer is providing legal services other than Exempted Services, the regular conflicts rules apply;
4. If a lawyer provides Exempted Services the following principles apply:
 - a. The scope of the Exempted Services retainer is limited to the summary services provided through the court-annexed or non-profit program. While the duty of confidentiality and loyalty endure, the lawyer-client relationship terminates at the end of the provision of the Exempted Services;
 - b. If a lawyer is aware of a conflict, the lawyer may not provide legal advice to the limited scope client (“LSC”), but may assess the LSC’s suitability for services provided through the court-annexed or non-profit program and refer the LSC to another lawyer at the program or clinic;
 - c. If a lawyer is not aware of a conflict, the lawyer may provide Exempted Services. As the services are summary in nature and the risk associated with not performing the conflicts search is outweighed by the social benefit of the Exempted Services, the lawyer is not required to check for conflicts prior to, or following, providing the Exempted Services;
 - d. If, at any time during provision of the Exempted Services, a lawyer becomes aware of a conflict, the lawyer must immediately cease providing legal advice or services and refer the LSC and the notes taken to another lawyer at the clinic or program. If no lawyer is available, the LSC should be put in touch with a program staff person to coordinate the appointment of a new lawyer;
 - e. A lawyer who provides Exempted Services may not divulge the LSC’s confidential or privileged information to anyone including other lawyers at

the lawyer's firm, save as provided by law. Maintaining the LSC's confidences is an important safeguard in protecting the LSC's information and guarding against the inference that other people at the lawyer's firm possess the confidential information;

- f. A lawyer who provides Exempted Services should not personally retain notes of the advice given; rather, the court-annexed program or non-profit clinic should be responsible for record keeping.
5. Because the exemption from performing a conflicts search is predicated, in part, on the concept that the Exempted Services are summary in nature, the following rules apply to circumstances where a lawyer has contact with the LSC on subsequent occasions:
 - a. If the LSC contacts the lawyer, the lawyer must conduct a conflicts search prior to engaging the LSC in a new retainer;
 - b. If the lawyer has advance notice that the lawyer will be speaking with the LSC on a subsequent occasion, the lawyer must conduct the conflicts search prior to that meeting;
 - c. If the lawyer happens to be assigned the LSC a subsequent time while providing Exempted Services, and in circumstances not captured in 5(b), the lawyer may provide summary legal advice on that occasion but must conduct a conflicts search upon returning to the lawyer's firm.
6. If, following the provision of the Exempted Services, a lawyer becomes aware of a conflict between the LSC and a firm client:
 - a. The regular rules for determining whether the lawyer may act for or against the existing client, the LSC, or a future firm client, apply. The Exempted Services will be treated as an isolated event that do not require prior informed consent;
 - b. Despite the duty the lawyer owes to his or her clients, the lawyer must not divulge the confidential information received by the LSC during provision of Exempted Services, and the lawyer must not divulge the existing client's confidential information to the LSC.
7. No conflict of interest that arises as a result of a lawyer providing Exempted Services will be imputed to the lawyer's firm, and the firm may continue to act for its clients who are adverse in interest, or future clients who are adverse in interest, to the LSC.
8. In order to enhance access to justice, individuals who are adverse in interest should be able to obtain legal advice from the same court-annexed or non-profit program regarding their common dispute, provided the program has sufficient safeguards in place to ensure that lawyers who provide Exempted Services to

clients opposed in interest do not obtain confidential information arising from the opposing client's consultation. If the lawyers become aware of a conflict within the court-annexed or non-profit program, the clients must be advised of the conflict and the steps that will be taken to protect the clients' confidential information.

□ **EDUCATION AND TRANSITION**

Recommendation 16:

In light of the rise in self-represented litigants before the court, court rules should be written in plain language and should strive for consistency between the various levels of court. The various rules of court should create definitions that make it clear which provisions apply to limited retainer lawyers, full service lawyers, and lawyers of record. Nomenclature should be consistent at all levels of court, and if distinctions are to be made between "lawyer", "solicitor", "counsel", and those "of record", these distinct usages should be defined.

Recommendation 17:

In order to facilitate the delivery and use of limited scope legal services, plain language educational material regarding limited scope legal services, self-representation, and partial representation, should be made available to:

- (a) Members of the public;
- (b) Lawyers; and
- (c) Judges, masters and court staff.

1. LIMITED SCOPE LEGAL SERVICES

GENERAL PROFESSIONAL CONDUCT

Recommendation 1:

Because limited scope legal services can enhance access to justice for people who will not retain a lawyer for full service representation, 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.

Recommendation 2:

Amendments to the *Professional Conduct Handbook* providing guidelines for limited scope legal services should, as a general rule, not create a lesser standard of professional responsibility than is otherwise expected of a lawyer. While the scope of services may be limited, the lawyer should provide those services to the level expected of a competent lawyer in a similar situation, taking into account the factors set out in the *Professional Conduct Handbook* for professionalism and ethics.

Recommendation 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.

1.1 What are limited scope legal services and why are they an issue?

Limited scope legal services refers to a situation where a lawyer performs discrete tasks for a client, and the client handles other matters that, in a full service retainer, would form part of the services the lawyer would provide. Limited scope legal services are already being provided in British Columbia and other jurisdictions. In the United States, such services are often referred to as “unbundling”, and the topic has received a great deal of attention: symposiums have been held, articles as well as ethics opinions from state Bars have been written, and several states have amended their rules of professional conduct to deal with issues that arise in the provision of unbundled legal services.

While it is possible for a lawyer to provide limited scope litigation services to a client, for the most part the rules that govern professional conduct are not drafted with this in mind, nor are the various rules of court. The typical model for litigation services is one of full representation or no representation.

Solicitors, on the other hand, have been providing limited scope services to clients for some time. A lawyer or firm providing legal services regarding a corporate acquisition might refer the tax aspects of the transaction to a specialist; a client might send its intellectual property work to one firm and its employment law work to another; a corporate client might refer some aspects of a transaction to outside counsel, while

handling other matters in-house. These situations reflect the freedom to contract for discrete services and are not, in the ordinary course of events, problematic.

Part of the reason limited scope retainers work well in solicitors' practice is because of the certainty that exists in the scope of most forms of solicitors' work: a lawyer who enters a retainer to draft a trademark licence will not suddenly find himself or herself conscripted into providing an opinion on the viability of geothermal energy, or appearing before the Workers Compensation Board. The success of solicitors providing limited scope legal services stands as a reminder that the concept is not antithetical to the practice of law, and that the challenges to providing limited scope litigation services are not insurmountable.

In contrast, limited scope services in litigation can create complications because the extent of a lawyer's obligations is not always clear. A lawyer who is retained to provide limited scope services in a litigation matter may find him or herself conscripted into a broader retainer than was originally contemplated. Other litigants, opposing counsel and the court, may be uncertain about the role the lawyer acting under a limited retainer is performing. Whereas solicitors' work often deals with prospective matters where parties are seeking to arrive at a mutually acceptable bargain, litigation usually starts from a situation where something has gone wrong and rights and obligations are being disputed. As such, litigation has the potential to drag people into the legal process unwillingly, and the adversarial model can polarize positions.

Litigation is a different legal environment than solicitor's work, with its own unique features and challenges. For solicitors to understand the challenges a litigator faces in delivering limited scope legal services it might be useful to consider what would happen if a client were to ask a solicitor to only advise on the portions of a contract that deal with one party's obligations, or only draft the portions that deal with a payment schedule. Thought of in this manner, solicitors can readily see that many questions about the scope of professional duty come to mind:

- Having read the portions of the contract drafted by the client, what obligation does the solicitor have to advise of problems?
- How do the clauses drafted by the solicitor interact with clauses drafted by the client?
- What liability issues arise from taking on the retainer?
- How much time and effort, beyond that contemplated in the limited retainer, will have to be expended to meet the expected standards of professional conduct?
- What if the client says he or she will draft the remainder of the contract based on the clauses the solicitor provides?
- Is the solicitor required to revise the work based on future negotiations?
- Is it even possible to deliver the requested services in a competent manner?

These are just a few concerns. To better understand limited scope legal services, it is important to look at the forces that have fostered it.

1.2 Forces leading to the rise in limited scope legal services

There are a number of forces that have given rise to the increase in limited scope legal services. Although the forces are not independent, they can be divided into two broad categories: economic forces, and cultural forces.

Economic forces

In 1996, the Canadian Bar Association (“CBA”), Systems of Civil Justice Task Force tabled its report (“CBA Report”) setting forth 53 recommendations for modernizing the Canadian civil justice system.¹ The CBA Report found, at page 12, that the public, and those in the legal profession, identified the top three issues impacting access to justice as:

Issue	Priority to Public	Priority to Lawyers
The speed with which disputes are resolved in the civil courts	1	2
Public understanding of the work in the civil courts	2	3
Affordability of dispute resolution in the civil courts	3	1

These problems and concerns are as relevant today as they were a decade ago.

Many litigants cannot afford full service representation, and there is no guaranteed right to government-funded counsel in civil litigation. A litigant must qualify for legal aid, find funds through other channels, or receive *pro bono* assistance or the assistance of counsel operating on a contingent fee basis (where contingent fees are permitted), or a reduced fee retainer. Absent such options, the litigant must self-represent, or not engage the legal system (which is not an option for some). There is plenty of anecdotal evidence about the rise in self-represented litigants in Canadian courts, but comprehensive, empirical studies are not yet available.² The cost of litigation seems to be an important driver in the phenomenon of self-representation, but it is difficult to assess the weight to be given to any particular factor in the cost of litigation, and the quality of justice received by self-represented litigants is difficult to measure.

It is worth noting that there is a disparity in the economic resources of the typical client who requires litigation services and the typical client who requires discrete task

¹ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice*. Ottawa, ON: Author, 1996.

² See, Alberta Law Reform Institute, *Alberta Rules of Court Project: Self-Represented Litigants*, Consultation Memorandum No. 12.18, March 2005, Chapter 1, Part D.

solicitors' services. The former contains a much larger pool of people of modest means, and the costs of engaging an adversarial litigation system is prohibitive. In contrast, the solicitors' services required by individuals of modest means, often have, for a variety of reasons, a correspondingly modest cost. In making its recommendations, the Task Force has tried to be mindful of the growing economic necessity of limited scope litigation services.

One study in the criminal law context found that unrepresented accused take less time moving through the system than represented accused.³ While this militates against the argument that unrepresented accused place a greater burden on the justice system than represented accused, it raises the question of the quality of access to justice unrepresented defendants are receiving. It is possible a similar pattern exists in civil litigation, but it is also possible that some of the factors that lead to shorter trials in a criminal context are less prevalent in the civil context. For example, a repeat criminal offender might plead guilty to get matters over with, whereas a civil litigant might assiduously pursue a claim or defense. In addition, Crown lawyers conduct criminal prosecutions, whereas a civil matter may have one or both parties acting without counsel. That having been said, in a superior court the presence of counsel may drag out the litigation process through use of discoveries, expert witnesses, and interlocutory applications. More research is required to transform speculation into principled thought, but if the reforms proposed by the BC Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice*, (November 2006), have the desired effect, the latter concern will likely be addressed. The authors of that report note unbundled legal services, as well as changes to the conflict of interest rules to facilitate lawyer participation in *pro bono* legal work through a clinic, are important elements of successful civil justice reform.

Cultural forces

Our present civil justice system and model for delivery of legal services was refined in the Industrial Age. The architecture for delivery of legal services and the administration of the justice system is being strained by the emergence of new technologies in the Information Age. The Internet and related computer technology have changed the way law is being practiced, but it is also changing the way people obtain information. A lawyer is no longer the gatekeeper or intermediary between the layman and legal information. Modern technology allows people to find legal information without the assistance of a lawyer, and the self-help culture that pervades society is influencing how people view the information services a lawyer provides. Many businesses that are set on delivering services on an antiquated model are struggling to deal with modern technology and the expectations of today's customers. The legal profession must learn how to adapt in order to keep pace with the public's demands and expectations for how information-based services are delivered.

The economic and cultural forces that have given rise to an increase in limited scope legal services, have also given rise to the increase in self-representation before the courts.

³ Ab Currie, "A Burden on the Court? Self-Representing Accused in Canadian Criminal Courts", *JustResearch* No. 11 (2004), online: http://www.justice.gc.ca/en/ps/rs/rep/justresearch/jr11/jr11_005a.html.

The phenomenon of self-represented litigants is important to understand in order to see how limited scope legal services might enhance access to justice.

1.3 The rise of self-representation before the courts

There are a number of reasons why a litigant might proceed without representation. Two core distinctions are between those litigants who want representation, but for various reasons do not secure it, and those litigants who do not want to be represented. A number of commentators label the former as “unrepresented litigants” and the latter as “self-represented litigants”. In this Report, the term self-represented litigant is intended to encompass any individual who acts without the assistance of counsel.

Any of the following might apply to the self-represented litigant, including a combination of characteristics:⁴

- The litigant might not be able to afford a lawyer;
- The litigant might not qualify for legal aid;
- The litigant might not take advantage of legal resources due to a lack of understanding of what resources are available, and/or because of an inability to access those resources;
- The litigant might believe it is not worth the money to hire a lawyer;
- The litigant might not believe a lawyer will improve his or her case;
- The litigant might believe he or she has sufficient knowledge and/or skill to conduct the litigation without representation.

There are many types of self-represented litigants, and trying to assign a singular motivation or set of needs to self-represented litigants is not desirable.

During an August 2006 speech to the CBA, Chief Justice McLachlin called the number of self-represented litigants in Canadian courts an “epidemic of lack of representation.” The Chief Justice asked: “Can more creative ways be found to bill clients proportionate to the complexity and the value of the proceedings?” The media reported the Chief Justice’s observations in different ways: a CBC News article appeared under the title “Self-representation creating chaos in courts: chief justice”,⁵ whereas The National Post proclaimed: “SCOC judge want’s [sic] lawyer’s [sic] fees lowered”.⁶ The issue that can easily be lost in headlines is the relationship between the self-represented litigant and

⁴ The reasons for self-representation are canvassed in many sources, and other reasons exists. See, for example: Canadian Bar Association, *The Future of the Legal Profession: The Challenge of Change* (August 2000); American Bar Association, Report of the Modest Means Task Force, *Handbook on Limited Scope Legal Assistance* (2003); National Center for State Courts, *The Future of Self-represented Litigation: Report from the March 2005 Summit*.

⁵ CBCnews Canada, at URL: <http://www.cbc.ca/canada/story/2006/08/12/court-representation.html>.

⁶ National Post, at URL: <http://www.canada.com/nationalpost/news/story.html?id=1bc6c33f-90d6-45a0-9b7d-398110ca22e8&k=38659>.

access to justice. This is a problem that lends itself to sound bites, but not simple solutions.

This report is not about legal fees, but it is worth noting that the relationship between lawyers' fees and the client's capacity to pay requires more thought than merely looking at fees alone. At a minimum, it requires an analysis of the various factors in why a growing number of litigants might not be able to afford the fee. The market may have set lawyers fees high, but to the extent that Canadians shoulder more debt and save less income today than they did 20 years ago,⁷ and to the extent that court processes consume more time and resources than they did 20 years ago, we can see that there is an interrelation of agencies at play in the rising trend of self-represented litigation. Litigation is complex, time consuming, costly, and litigants have less money than they did in the past to risk engaging the legal system, or when they do engage it, to retain counsel for full service representation. The Chief Justice raises the important concept of proportionality. Proportionality in process is a critical element of the proposed reforms of the Civil Justice Reform Working Group. The Task Force believes that limited scope legal services may provide representation that is proportionate to the value of the proceedings, and the nature of the proceedings, taking into account the means and values of the client when he or she engages in the legal system.

Limited scope legal services can also provide self-represented litigants with an adequate knowledge base upon which to understand the litigation process. The Canadian Judicial Council suggests:

Equal access to justice depends on awareness of procedural and substantive law: thus, representation by qualified counsel is virtually indispensable. The fact that more and more litigants are choosing to represent themselves in court means that judges and courts face new challenges in the fair, timely and efficient delivery of justice. Even the simplest of court procedures can be overwhelming for the non-specialist. Self-represented litigants are often unaware of their rights and the consequences of legal decisions.⁸

In tackling its work, the Task Force started from the premise that creating clear rules for limited scope legal services is an access to justice issue, and that any recommendations arising from the Task Force's work should enhance, and not hinder, meaningful access to justice. In order to better understand the issues that arise when lawyers provide limited scope services to litigants, it was important to obtain an understanding of the sort of the reasons a litigant might be self-represented.

What is needed is a flexible approach that enhances access to justice, provides guidelines for lawyers, clients and the judiciary, and doesn't compromise important values, such as the rule of law or the public confidence in the administration of justice. It must be borne in mind, however, that "access to justice" is a complex concept that shifts and evolves

⁷ Various reports documenting these trends are available through Statistics Canada's website, URL: <http://www.statcan.ca/menu-en.htm>.

⁸ Canadian Judicial Council, *2004-2005 Annual Report*, page 20.

with society. Therefore, the use of “access to justice” in this report should not be read as referring to a fixed concept. For unbundling to provide meaningful access to justice, the rules governing the provision of unbundled services must be flexible and responsive to our evolving understanding of what access to justice means.

1.4 Increasing access to justice: the practical necessity of limited scope legal services

A litigant is entitled to expect access to justice – the expectation is of an ideal, and practical barriers can frustrate the realization of the ideal. Because access to justice involves both an articulation of our societal aspirations and ideals for how the justice system should operate, and our knowledge of the limitations placed on the realization of the ideal, it is difficult to speak of access to justice in absolute terms. We live in a world of ideals, but not an ideal world, and the pragmatic truth is that the administration of justice costs money.

The infrastructure that supports the justice system comes at a cost, and the professional services necessary for the effective operation of the justice system require an expenditure of time and the application of skill and knowledge. The real costs in the system must be supported by funds, and in some instances by cash substitutes (e.g. *pro bono* services, volunteer services). The government must pay the civil servants involved in the justice system. Taxes pay for this aspect of access to justice. Taxes, charitable donations, and permissible investment and revenue streams pay for funding of available legal aid services. Lawyers contribute to the economic aspect of access to justice in numerous ways, including providing services for flat rate fees, discounting their time, providing services on a contingent fee basis, providing *pro bono* assistance, etc.

As the Canadian Judicial Council notes, access to justice is about more than access to the machinery of the justice system: it requires that the litigant (or his or her counsel) has an understanding of both procedural and substantive law. By virtue of this, represented litigants often fare better than self-represented litigants. In exploring the issue of limited scope legal services, the Task Force considered both procedural and substantive legal issues, as well as issues relating to geography, culture, language, and economics.

The Task Force recognizes that, just as the reasons why a litigant may be self-represented are diverse, the possible ways of reducing strain on the judicial system and providing litigants meaningful access to justice are diverse. Providing limited scope legal services is one of many possible ways of helping litigants receive improved access to justice. There may not be a miracle cure for the “epidemic” of self-represented litigants, and the Task Force does not suggest limited scope legal services are the *solution* to a complex phenomenon. The Task Force does believe, however, that limited scope legal services can be part of a broader solution, and an important tool in enhancing meaningful access to justice.

2. KEY ISSUES IN PROVIDING LIMITED SCOPE LEGAL SERVICES

The Task Force considered the issues that arise in provision of limited scope legal services in relation to four main topics:

1. Lawyers providing confidential drafting assistance;
2. Lawyers making limited appearances in court as part of the limited scope retainer;
3. Lawyers providing legal information and advice under a limited scope retainer; and
4. Lawyer providing legal services at a court-annexed program, or at a non-profit legal service program.

In considering these thematic topics, the Task Force explored issues relating to: communications between lawyers, clients, and the court; conflicts of interest and the duty of loyalty; whether the limited retainer rule in *Professional Conduct Handbook*, Chapter 10 requires revision; the ethical and professional standards issues that arise in the provision of limited scope legal services; whether limited scope legal services expose lawyers to greater liability and the insurance issues involved in providing limited scope services; and the role education can play in ensuring unbundled legal services enhance access to justice.

2.1 CONFIDENTIAL DRAFTING ASSISTANCE

Recommendation 4:

It is not improper for a lawyer to provide confidential drafting assistance to clients. 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.

Recommendation 5:

In order to best assist the client and the court, the lawyer who provides drafting assistance should draft the documents using clear, plain language, and ensure that the client understands the meaning and possible consequences of the documents as well as the limited scope of the retainer and confirm this understanding, where reasonably possible, in writing.

Recommendation 6:

The *Rules of Court* should not require a lawyer to file an appearance simply because the lawyer drafted or assisted in drafting documents (ultimately) filed in court.

Recommendation 7:

A lawyer who provides drafting assistance to an otherwise self-represented litigant should be allowed to rely on that litigant's representation of the facts, unless the lawyer has reason to believe the representations are false or materially insufficient.

2.1.1 Principles that should govern the provision of confidential drafting assistance

Based on its research and consultation, the Task Force is of the view that the topic of confidential drafting assistance is relatively non-controversial in the British Columbia context. As such, the detailed overview of the topic is contained in Appendix B.

During its consultations the Task Force discovered that confidential drafting assistance is a common service being offered in British Columbia, although there is a modest degree of uncertainty regarding how it fits within the rules of professional conduct. Much of the debate on this topic in the US stems from a variety of views as to whether it is ethical to provide anonymous drafting assistance to a litigant. The prevailing, though not unanimous, view of the Masters the Task Force spoke with was that anonymous drafting assistance was not a problem. From the perspective of practitioners, the prevailing view was that a lawyer should be able to provide anonymous drafting assistance, and even if the lawyer's identity was disclosed to the court or a third party, such disclosure should not operate to increase the scope of the retainer.

The Task Force believes that confidential drafting assistance can be of value to both litigants and the court by improving the quality of documents placed before the court.

For this benefit to be realized, the Task Force believes the documents must be written in clear, plain language. In addition, the client needs to understand what the documents mean, because the client may be required to speak to the document before the court. If the self-represented litigant is asked what a document means, and answers “I don’t know, my lawyer wrote it”, it is natural for the court to ask why the lawyer is not present. Therefore, it is incumbent on the lawyer to explain the scope of the services to the client and to ensure the client understands the document and its relevance to the context of the client’s case, as well as the possible consequences⁹ of the document.

In keeping with Recommendation 2, a lawyer who provides confidential drafting assistance services must understand that in some circumstances it is not sufficient to rely on the client’s representation of the facts. A lawyer is not permitted to take a relaxed approach to professional or ethical standards merely because he or she is providing behind-the-scenes assistance. A lawyer providing confidential drafting services must be alert to fraud, and remain mindful of his or her obligation to the courts. When the client’s version of the facts does not ring true, a lawyer is expected to perform additional reasonable inquiries before providing the client with drafting assistance, or decline the retainer.

⁹ For example: if the client wishes the lawyer to assist in drafting a Statement of Claim alleging fraud, advising of the possible consequences might include alerting the client to the potential ramifications of failing to make the case for fraud.

2.2 COMMUNICATIONS BETWEEN LAWYERS, PARTIES AND THE COURTS

Recommendation 8:

For purposes of greater clarity, the Ethics Committee should consider making an annotation or footnote for *Professional Conduct Handbook*, Chapter 10, Rule 10, to make it clear that a lawyer providing anonymous drafting assistance is not inconsistent with the scope and purpose of that rule.

Recommendation 9:

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:

1. The lawyer has been notified of the limited scope lawyer's involvement;
2. The communication concerns an issue within the scope of the limited scope lawyer's involvement; and
3. 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.

Recommendation 10:

For consistency and certainty the British Columbia Court of Appeal and British Columbia Supreme Court should be asked to draft orders of the court in circumstances the court deems appropriate.

Recommendation 11:

In order to facilitate the delivery of limited scope legal services, new court rules and court forms, drafted in plain and concise language, are required to allow a lawyer providing limited scope legal services to go on and off the record in an expedited manner, thereby communicating the scope of that lawyer's involvement to the court, the court registry and interested parties.

Recommendation 12:

The rules regarding service and delivery of documents should be amended to make it clear when service or delivery on a lawyer who is providing limited scope legal services is permissible.

Recommendation 13:

A lawyer who provides limited scope legal services should inform the client about the scope of services and the limits and risks associated with the limited services provided.

2.2.1 Overview of communication issues in the provision of limited scope legal services

The general rule regarding communications is that lawyers communicate with each other, and not directly with a represented individual. Service and delivery rules generally allow for, or require, service or delivery on the party or the party's lawyer. When a lawyer is involved in a matter for a limited purpose, problems can arise around the rules for communication with other lawyers, litigants, and the court.

2.2.2 Limited appearances by a lawyer in court

The *Professional Conduct Handbook*, Chapter 10, Rule 10, reads:

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.

This provision makes it clear that a limited litigation retainer is permissible. Some of the problems that arise, however, are that the rule can be inconsistent with providing confidential drafting assistance, it is unclear what is meant by "any other interested person in the proceeding", there is no indication if misleading is linked to any sort of severity test, and the rule clearly provides no guidelines for solicitors engaged in limited scope retainers.

It should be noted that limited appearances already occur in British Columbia courts: the availability of duty counsel is but one instance of this. The Task Force discussed limited appearances at a meeting with Masters of the British Columbia Supreme Court. The Masters indicated that lawyers are already making limited appearances before the court, informing the court that the scope of their retainer is limited. However, on occasion the court is not aware that the retainer is limited until later in the proceeding. The general perspective was that it is preferable to have a lawyer involved, even for limited purposes. The preferred approach is that it be made clear that the retainer is limited. Some of the complexities raised by the Masters included:

- the difficulty of assessing a Bill of Costs;
- the lawyer may not be able to explain to the court the history of the matter; and
- in what circumstances should the lawyer be required to draft and/or sign the order.

Commentators note that there are advantages and disadvantages to limited appearances by a lawyer. Some advantages of establishing clear rules for limited appearances include:

- Partial representation by counsel may be affordable to a client who cannot afford full representation;
- Lawyers need certainty that the court will respect the scope of the retainer the lawyer and client have agreed upon;

- Absent clear guidelines, a limited retainer lawyer may have ongoing obligations that transform the retainer into a full service retainer;
- It enhances and improves the quality of access to justice.

Arguments against limited retainers include:

- It might prevent the lawyer from providing competent representation;
- Limited retainers can create uncertainty for the parties involved if they do not know the scope of the retainer;
- Limited retainers could create a chain of unbundled lawyers acting in a matter.

The Task Force believes the Ethics Committee should consider making an annotation or footnote to Chapter 10, Rule 10 to indicate it is not inconsistent with the provision of anonymous drafting assistance.

2.2.3 Lawyer communications with partially represented litigants?

The *Professional Conduct Handbook*, Chapter 4, Rules 1 & 1.1, Chapter 5, and Chapter 8 are relevant to the topic of communication in limited scope litigation scenarios. When a lawyer is providing limited scope legal services, the traditional communication rules can become blurred. The Task Force is of the opinion that clear communication between the limited scope lawyer and the client is essential, and that the nature and scope of the retainer must be established and agreed upon in order for proper communication to occur. Having a clear framework for the relationship simplifies the task of informing interested parties of the involvement of the lawyer. To eliminate confusion, it is important to determine the scope of the lawyer's authority.

The Task Force believes that the onus should lie with the lawyer who is providing limited scope legal services to notify opposing counsel of the existence and scope of the limited retainer, as well as setting out the communication guidelines. The current wording of the *Professional Conduct Handbook*, Chapter 4, Rule 1.1 does not require such efforts. The current rules do not distinguish between full representation and limited scope services.

2.2.4 Who should be responsible for drafting and entering a court order?

One of the areas of concern raised by Masters of the BC Supreme Court related to orders. The Masters indicated that potential for confusion exists regarding who is responsible for preparing the order in circumstances where limited scope legal services are provided. The Task Force considered the various court rules to determine whether a lawyer providing limited scope legal assistance is required to enter the order, might be required to enter the order, or can choose to enter the order.

Part of the problem is one of interpretation. The various court rules acts refer to lawyer, lawyer of record, solicitor, solicitor of record, or qualify the term lawyer by indicating the lawyer is acting for or representing a party. Court rules in general are internally

inconsistent in the use of “lawyer of record” and “lawyer”. Without clear definitions, a lawyer who is providing limited scope legal services may be a lawyer for the purposes of court rules without the lawyer or the client ever intending that to be the case.

The status of lawyers appearing before the court in a limited capacity, and their obligations regarding orders requires clear, comprehensible rules. Case law exists for the proposition that a lawyer making a limited appearance before the court does not attract the obligations of a solicitor of record,¹⁰ but clear rules and procedures would go a long way to establishing certainty.

One possible solution, at any level of court, is having forms that would allow the lawyer to communicate to the court the limited scope of the retainer, and whether or not the retainer contemplated the lawyer being responsible for entering the order. The BC Supreme Court Self-Help Information Centre (“SHC”), *Final Evaluation Report*, August 2006, indicates that, “the Centre’s work has served to highlight the need for plain language precedents and documents, based on more accessible rules” (p. 49). The Task Force believes that clear language court rules that allow for limited scope legal services and provide a framework for those services is important. If the recommendation of the Civil Justice Reform Working Group that the Supreme Court Rules be rewritten is adopted, clear definitions and rules regarding lawyers providing limited scope legal service should form part of the new rules.

For consistency and certainty the British Columbia Court of Appeal and British Columbia Supreme Court should be asked to draft orders of the court in circumstances the court deems appropriate. Further, the Task Force understands that in the Supreme Court there is not a consistent protocol regarding parties obtaining access to the Clerk’s notes. The Task Force believes that at a minimum the Supreme Court should establish a protocol whereby parties can have access to the Clerk’s notes to assist with drafting orders. Having a uniform approach through all registries will improve public understanding and perception of the justice system.

2.2.5 Getting on and off the record.

During its consultations, the Task Force became aware that lawyers were concerned about the difficulty of getting off the record at the end of a limited appearance. Lawyers said that having simple procedures to allow for this would be helpful. The courts, on the other hand, are justified in being concerned about having lawyers speak to matters without going on the record. The Task Force believes that lawyers who make limited appearances should go on the record, but that there needs to be simplified rules and procedures for getting on and off the record. The Task Force believes having a court form that both the lawyer and client sign, that sets out the scope of the lawyer’s appearance before the court would eliminate confusion. It is important that this not add a layer of cost and complexity to the proceedings. The Task Force does not believe duty counsel should be subject to this requirement given the nature of their work.

¹⁰ *Logan v. Logan* (1993), 15 O.R. (3d) 411 at para. 8(1) (Gen. Div.)

2.2.6 What are the service issues in an unbundled litigation scenario?

In considering what service issues exist in a limited scope litigation retainer, the Task Force was confronted with similar interpretation problems as arose in the context of confidential drafting assistance. The question of whether an unbundling lawyer is acting for the client or representing the client is difficult because the lawyer will be doing this for part of the litigation, but not all of the litigation. As such, the various court rules contemplate service on the lawyer who is providing limited scope legal services, but it is unclear whether that service would still be permissible following the limited appearance, at which time the client would have resumed conduct of the litigation. Following the completion of a limited appearance can a lawyer still be said to be acting for or representing the client?

It would be helpful to have a better definition of what “lawyer” means and how that definition applies to limited scope legal services in order to help reduce confusion.

2.3 CONFLICTS OF INTEREST

Recommendation 14:

Save as described in Recommendation 15, the regular rules governing conflicts of interest and duty of loyalty should apply to limited scope legal service retainers.

Recommendation 15:

Because the current conflict of interest rules, and rules regarding duty of loyalty, can create impediments to lawyers providing legal services at court-annexed and non-profit legal clinics or programs, and because of the summary nature of those services and the importance of those service for enhancing access to justice, the *Professional Conduct Handbook* should be amended to encompass the following principles:

1. The recommendations for modifying the conflicts of interest rules apply only to circumstances where a lawyer, under the auspices of a program operated by a court or a nonprofit organization, provides short term limited legal services to a client in circumstances where neither the lawyer or client expect that the lawyer will provide continuing representation in the matter (the “Exempted Services”).
2. In circumstances where it is practicable to do so, a lawyer should conduct a conflict of interest search prior to providing Exempted Services;
3. If the lawyer is providing legal services other than Exempted Services, the regular conflicts rules apply;
4. If a lawyer provides Exempted Services the following principles apply:
 - a. The scope of the Exempted Services retainer is limited to the summary services provided through the court-annexed or non-profit program. While the duty of confidentiality and loyalty endure, the lawyer-client relationship terminates at the end of the provision of the Exempted Services;
 - b. If a lawyer is aware of a conflict, the lawyer may not provide legal advice to the limited scope client (“LSC”), but may assess the LSC’s suitability for services provided through the court-annexed or non-profit program and refer the LSC to another lawyer at the program or clinic;
 - c. If a lawyer is not aware of a conflict, the lawyer may provide Exempted Services. As the services are summary in nature and the risk associated with not performing the conflicts search is outweighed by the social benefit of the Exempted Services, the lawyer is not required to check for conflicts prior to, or following, providing the Exempted Services;

- d. If, at any time during provision of the Exempted Services, a lawyer becomes aware of a conflict, the lawyer must immediately cease providing legal advice or services and refer the LSC and the notes taken to another lawyer at the clinic or program. If no lawyer is available, the LSC should be put in touch with a program staff person to coordinate the appointment of a new lawyer;
 - e. A lawyer who provides Exempted Services may not divulge the LSC's confidential or privileged information to anyone including other lawyers at the lawyer's firm, save as provided by law. Maintaining the LSC's confidences is an important safeguard in protecting the LSC's information and guarding against the inference that other people at the lawyer's firm possess the confidential information;
 - f. A lawyer who provides Exempted Services should not personally retain notes of the advice given; rather, the court-annexed program or non-profit clinic should be responsible for record keeping.
5. Because the exemption from performing a conflicts search is predicated, in part, on the concept that the Exempted Services are summary in nature, the following rules apply to circumstances where a lawyer has contact with the LSC on subsequent occasions:
- a. If the LSC contacts the lawyer, the lawyer must conduct a conflicts search prior to engaging the LSC in a new retainer;
 - b. If the lawyer has advance notice that the lawyer will be speaking with the LSC on a subsequent occasion, the lawyer must conduct the conflicts search prior to that meeting;
 - c. If the lawyer happens to be assigned the LSC a subsequent time while providing Exempted Services, and in circumstances not captured in 5(b), the lawyer may provide summary legal advice on that occasion but must conduct a conflicts search upon returning to the lawyer's firm.
6. If, following the provision of the Exempted Services, a lawyer becomes aware of a conflict between the LSC and a firm client:
- a. The regular rules for determining whether the lawyer may act for or against the existing client, the LSC, or a future firm client, apply. The Exempted Services will be treated as an isolated event that do not require prior informed consent;
 - b. Despite the duty the lawyer owes to his or her clients, the lawyer must not divulge the confidential information received by the LSC during

provision of Exempted Services, and the lawyer must not divulge the existing client's confidential information to the LSC.

7. No conflict of interest that arises as a result of a lawyer providing Exempted Services will be imputed to the lawyer's firm, and the firm may continue to act for its clients who are adverse in interest, or future clients who are adverse in interest, to the LSC.
8. In order to enhance access to justice, individuals who are adverse in interest should be able to obtain legal advice from the same court-annexed or non-profit program regarding their common dispute, provided the program has sufficient safeguards in place to ensure that lawyers who provide Exempted Services to clients opposed in interest do not obtain confidential information arising from the opposing client's consultation. If the lawyers become aware of a conflict within the court-annexed or non-profit program, the clients must be advised of the conflict and the steps that will be taken to protect the clients' confidential information.

2.3.1 Conflicts of interest in limited scope retainers

A lawyer may provide limited scope legal services as part of the lawyer's regular practice, or through a court-annexed or non-profit legal service provider. The Task Force considered whether:

In order to enhance the delivery of limited scope legal services as a means of increasing access to justice, should the Law Society's Conflicts of Interest Rules be amended for situations where it may not be feasible for a lawyer to systematically screen for conflicts of interest while providing legal services at a court-annexed or non-profit program?

Most jurisdictions that have amended rules to allow for unbundled legal services have relaxed their conflicts of interest rules to facilitate lawyers providing legal services through non-profit and court-annexed limited legal advice programs. The SHC, *Final Evaluation Report*, found that "the availability of legal advice is the area of greatest unmet need identified by the evaluation" (p.74), and that:

The provision of legal advice at the Centre is not possible under the current Law Society Rules concerning professional liability. In addition, it would be necessary to do a conflict check for each client. (p. 61)

As noted, Civil Justice Reform Working Group identified changes to the conflict of interest rules as an important component of encouraging lawyers to engage in *pro bono* work with clinics.

The Task Force believes that a lawyer who, as part of his or her regular practice, provides limited scope legal services is required to conduct the regular searches for conflicts of interest. This is not difficult, as the lawyer should have a conflicts checking system in place that captures conflicts both at the beginning of the representation, and as they arise

throughout the course of the retainer. The lawyer in this scenario is presumed to have access to his or her conflicts database when approached by a potential client.

A lawyer who is providing legal services through a court-annexed or non-profit legal services provider will not likely have access to his or her conflict's database at the time of initial contact with the client. Contact may occur over the phone, and/or at an external facility and it is also possible for clients to drop-in. The Task Force has heard from representatives of the Legal Services Society and the SHC, amongst others, that there is a need to relax the current conflicts rules in circumstances where it is not feasible for a lawyer to systematically screen for conflicts of interest (e.g. at a drop-in centre where the lawyer provides limited, summary legal advice, or where the lawyer provides limited legal advice through a duty counsel program). A distinguishing feature of these services is that neither the lawyer nor the client expects that the legal services will be ongoing, although it is possible for a client to be a repeat user of a facility through which the services were provided and this should be taken into account.

2.3.2 American models for conflicts of interest in unbundled matters

ABA Model Rule 6.5 has the effect of excusing a lawyer who is participating in a non-profit or court-based program offering limited services from the obligation to check for conflicts of interest prior to providing the limited legal services. However, if the lawyer has actual knowledge of a conflict he or she may not act and the general conflict of interest rules apply, including the rules for imputed conflicts of interest. The rationale behind this approach was a desire to make it less onerous for lawyer to provide services through these programs.

The Task Force considers the approach taken by Washington State to be the most flexible and principled. The Washington State Court Rules: Rules of Professional Conduct, Rule 6.5 reads:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:

(1) is subject to Rules 1.7, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program;

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter; and

(3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) in providing limited legal services to a client if:

(i) the program lawyers representing the opposing clients are screened by effective means from information relating to the representation of the opposing client;

(ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of information relating to the representation; and

(iii) the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

The Washington State approach allows for lawyers who work at, or volunteer their time to, non-profit and court-annexed legal service providers to give limited term legal advice to clients without performing the standard conflicts of interest search. A lawyer who is aware of a conflict may not act for the client, but may still provide limited services sufficient to determine whether the client is eligible under the program and to refer the client to another lawyer. The rule also establishes a framework for determining whether two lawyers providing legal advice through a program can represent clients with conflicts of interest. If, during the course of providing legal advice to the client, the lawyer becomes aware of a conflict of interest the regular conflict rules apply, save that the lawyer could refer the client to a suitable lawyer within the program. If, after the initial consultation, the client desires to retain the lawyer, the lawyer will be required to perform the regular conflicts check.

The Washington State approach, the ABA Model Rule, and other models are intended to encourage lawyers to participate in non-profit and court-annexed legal service programs. The present conflict of interest rules create a barrier to lawyers providing assistance through these programs, and can frustrate access to justice. The Task Force recognizes, however, that it is not sufficient to put a rule in place that only deals with whether the lawyer is aware of a conflict at the time the limited scope legal services are being provided at the court-annexed or non-profit service. The conflicts rules have to address what happens when the lawyer returns to his or her firm and discovers that the firm is representing a client in circumstances that create a conflict between the existing client and the clinic/program client. The rules also have to address what happens in circumstances where the lawyer or his or her firm later wish to act for a person, and such a representation would create a conflict based on the prior limited scope legal work provided through the court-annexed or non-profit service.

2.3.3 Examples of how non-profit and court-annexed service providers in British Columbia deal with conflicts

The delivery of limited scope legal services is already a reality for non-profit and court-annexed legal service providers. The Legal Services Society (“LSS”) has, as a result of budget cuts, had to reduce its services from prior levels. This has required providing services and programs that are limited in scope. The LSS provides legal information, legal advice and legal representation. An individual who is applying for legal aid or receiving legal information is not deemed to be a client. An individual who is receiving legal advice or legal representation is deemed to be a client. Once an individual is a client, no individual adverse in interest may receive legal information (save for written material on display or at hand), legal advice, or legal representation from that office. The individual may seek legal assistance through another office. Each legal aid office is treated as a distinct unit for these purposes.

Criminal duty counsel also provide limited scope legal services. It is less likely, but not unheard of, for a conflict of interest to arise (e.g. co-accused). The Task Force heard from duty counsel, and was advised that the standard practise is to deal with conflicts based on having actual knowledge of the conflict. While duty counsel do not wish to run afoul of the Law Society’s conflicts rules, they believe their approach provides a practical method that balances the duty to protect a client’s interest with making sure as many accused as possible have access to justice.

2.3.4 Justification for amending the conflicts of interest rules for lawyers providing pro bono services at court-annexed and non-profit programs

The Task Force believes that if firms were to be disqualified from continuing to represent existing clients, or would be shutting the door on potential future retainers that may be lucrative, based on a lawyer of the firm providing legal advice at court-annexed or non-profit clinics, the objectives of increasing access to limited scope legal services could be frustrated. However, the duty of loyalty to a client is a core principle of the lawyer/client relationship, and rules protecting the interest and expectations of clients regarding confidentiality and a duty of loyalty are not to be cast aside or transformed to favour expeditiousness over ethics.

The Task Force considered the potential use of waivers for conflicts of interest, but concluded that such an approach presents several problems. For the waiver to be valid, it would require both the existing client and the new client to waive the conflict, and with informed consent. This would be administratively impractical, and there are some conflicts that cannot be waived in any event. Having a waiver that was only signed by one party would not amount to a true waiver, and while it would serve to alert the client to the concept of conflicts it would do little to resolve the concern. The Task Force is of the view that the better approach would be to clearly limit the scope of the retainer, and to have a mechanism for alerting the client to the concept of conflicts of interest and how conflicts would be handled should they arise. Providing the client with a clear and comprehensible limited retainer form is only part of the equation, however, and the Task Force recognizes that the conflicts of interest rules would have to be amended to create a narrow exemption for the conflict of interest rules. This exemption should seek to

balance the competing demands of the duty of loyalty to a client with the increasing need for limited scope legal services at court-annexed and non-profit programs, to assist litigants who may otherwise be self-represented.

The Task Force acknowledges that modifying the Law Society rules that govern conflicts of interest in order to facilitate limited scope legal services at court-annexed and non-profit programs is only part of the equation. The courts have inherent jurisdiction over conflicts before the court. As such, the concern remains that a lawyer who complies with the modified conflict of interest rules will be at risk of being found in conflict when appearing before the court, or that a lawyer from that lawyer's firm will have the conflict imputed to him or her. The Task Force hopes that the judiciary will be mindful of this risk and give due weight to the important public value in litigants of modest means receiving legal advice through court-annexed and non-profit programs, and that some firms will be wary of allowing lawyers to provide such services if the firm risks disqualification with respect to present and future paying clients.

The Task Force limits its recommendations regarding conflicts of interest to situations governing lawyers providing short-term legal advice and/or representation at court-annexed and non-profit programs. The recommendations should not be taken to mean the Task Force approves of a general relaxation of the conflicts of interest rules.

2.4 EDUCATION AND TRANSITION

Recommendation 16:

In light of the rise in self-represented litigants before the court, court rules should be written in plain language and should strive for consistency between the various levels of court. The various rules of court should create definitions that make it clear which provisions apply to limited retainer lawyers, full service lawyers, and lawyers of record. Nomenclature should be consistent at all levels of court, and if distinctions are to be made between “lawyer”, “solicitor”, “counsel”, and those “of record”, these distinct usages should be defined.

Recommendation 17:

In order to facilitate the delivery and use of limited scope legal services, plain language educational material regarding limited scope legal services, self-representation, and partial representation, should be made available to:

- (a) Members of the public;
- (b) Lawyers; and
- (c) Judges, masters and court staff.

2.4.1 Additional Matters: Education

In order for limited scope legal services to fulfill their promise to enhance access to justice, and to assist the courts, it is essential that lawyers, the judiciary and court staff, have access to education and training to deal with such services and self-represented litigants, and that members of the public have access to plain language resources to assist them in navigating the civil justice system. Such education might take the form of courses that instruct on best practices for providing limited scope legal services, how to deal with self-represented or partially represented litigants, as well as guides to educate the public to the role limited scope legal services might provide.

APPENDIX “A”
THE TASK FORCE’S MANDATE

In recent years, unbundled legal litigation services have received increased attention from lawyers and legislators. Unbundling refers to a retainer in which a lawyer provides limited scope services to a client, with the client managing those matters not performed by the lawyer. In 2004, the Access to Justice Committee considered the role unbundling might play in enhancing access to justice, and in December 2004 recommended to the Benchers that a Task Force be struck to examine unbundling in British Columbia. The Benchers, at their March 4, 2005 meeting, approved the following mandate for the Unbundling Legal Services Task Force (“Task Force”):

“The mandate of the Unbundling of Legal Services Task Force is to:

- (i). clarify the concept of “unbundling”* and its application to the practice of law in British Columbia by examining the various forms and ways in which “unbundled” legal services are, or might be offered,
- (ii). determine which forms and ways of offering unbundled legal services serve the public interest by increasing the public’s access to justice;
- (iii). review and analyze a range of topics related to the provision of “unbundled” legal services including ethical issues, professional conduct issues, possible revisions to the Law Society Rules and the Professional Conduct Handbook, relations with the Courts, liability and insurance issues, possible revisions to Law Society practice materials, and making information on unbundling available to lawyers, clients and the public;
- (iv). make recommendations to the Benchers based on the examination and review of the topics outlined in (i), (ii), and (iii).

*Some other terms that have been used to describe “unbundling” include limited retainers, discrete task representation, limited scope representation, and limited services representation.”

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Master Caldwell, Master Taylor, Judge O'Byrne, and Christine Elliott are former members of the Task Force. The Task Force is indebted to its former members, and all those who gave their time and shared their perspectives on this important topic. The Task Force received staff support from Charlotte Ensminger, Jeff Hoskins, Doug Munro and Ingrid Reynolds.

APPENDIX “B” CONFIDENTIAL DRAFTING ASSISTANCE

2.1 CONFIDENTIAL DRAFTING ASSISTANCE

As part of a limited scope retainer a lawyer might assist a client by drafting certain documents. In some circumstances, the client might wish for the lawyer’s assistance to remain anonymous (referred to in this Report as “confidential drafting assistance”). A lawyer might provide drafting assistance to a litigant who is self-representing at court. These documents might include pleadings, affidavit materials or any other court documents required in the course of litigation. The lawyer may draft the documents him or herself, assist the client with drafting the documents, or merely review them and suggest changes.

Nothing in the *Professional Conduct Handbook* prohibits confidential drafting assistance, and most US jurisdictions allow for it (in the US it is typically referred to as “ghostwriting”). The three main approaches to ghostwriting in the US are:

- “Some states require lawyers who draft pleadings as a discrete function to certify those pleadings, but allow the lawyer to primarily rely on the factual representation of the litigant rather than to conduct an independent inquiry.
- Some states are concerned that the courts will be misled if the role of the lawyer in drafting is not revealed to the court. In some jurisdictions, the lawyer’s name and contact information must be disclosed. In others, the court must merely be advised that the litigant had the assistance of a lawyer.
- The obligation to sign pleadings may result in an appearance and where it does, at least one state has recognized the need to create an exception and preclude the lawyer who is providing limited services from an obligation to provide more expanded services than he or she agreed to provide.”¹¹

There exists a large body of commentary out of the US on the topic of ghostwriting, as well as state Bar rules, ethics opinions, and court rules. The Task Force surveyed the American landscape, comparing the approaches taken with the rules and practice in British Columbia. Tentative findings on the topic were discussed with members of the BC Bar, and the courts.

The Task Force identified and explored the following issues relating to confidential drafting assistance:

¹¹ American Bar Association, Standing Committee on the Delivery of Legal Services, *An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants*, April 2005, pp. 14-15. Self-represented litigants are also known as *pro se* litigants or *pro per* litigants.

1. Should a lawyer be permitted to draft court documents on behalf of a self-represented litigant?
2. Must a lawyer's role in providing drafting assistance be disclosed to the court?
3. Should or does confidential drafting assistance, if disclosed to the court, constitute an entry of an appearance by the lawyer? And, is there a need for a rule regarding confidential drafting assistance and entries of appearance?
4. Should there be a rule to the effect that a lawyer who provides drafting assistance under a limited scope retainer can rely on the client's representation of the facts?

2.1.2 Should a lawyer be permitted to draft court documents on behalf of a self-represented litigant?

There are arguments both for and against confidential drafting assistance. Proponents believe it allows individuals who cannot afford to be represented by a lawyer to receive some assistance from a lawyer, and have some of their court documents crafted by a lawyer. The value being espoused is that access to justice should not be contingent on being represented by a lawyer. It is also argued that properly drafted documents will assist the courts: the theory is that documents drafted by a lawyer are easier to understand and more relevant than documents drafted by lay litigants. Some arguments against the practice include that it may mislead the court or other parties into thinking the self-represented litigant drafted the document. Some believe that confidential drafting assistance can give the self-represented litigant an unfair advantage if the litigant receives preferential treatment on account of being self-represented. Many commentators note that a flaw in these arguments is that the efficacy of confidential drafting assistance has to be assessed in a factual context, and that blanket statements lauding or condemning the practice are overly simplistic.

Consultations with members of the BC Bar reveal that confidential drafting assistance is common among solicitors, and is also occurring in the litigation context. The Task Force believes that confidential drafting assistance is a valuable service, and endorses the practice if it is provided in appropriate circumstances and for no improper purpose. The Task Force believes that, for confidential drafting assistance to live up to its promise in assisting self-represented litigants, the lawyer performing the services must draft the document using clear, plain language and ensure the client understands the document and its relevance to the context of the client's case, as well as the possible consequences of the document. It is important that the litigant be able to answer questions about the document without having to contact the lawyer to ask what the document means.

2.1.3 Must a lawyer's role in providing drafting assistance be disclosed to the court?

The issue of whether a lawyer must disclose to the court his or her role in drafting documents presents interpretation problems. As noted, nothing in the *Professional Conduct Handbook* prohibits confidential drafting assistance, and at present the better view is that there is no requirement for the lawyer to identify him or herself as the drafter

of documents if the drafting occurred as part of a limited retainer, the lawyer is not on record as acting for the client, and the lawyer and client have agreed that the lawyer will not be identified. However, determining how confidential drafting assistance fits within the current provisions for a limited retainer is not simple.

The *Professional Conduct Handbook*, Chapter 10, Rule 10 reads:

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.

The Task Force considered the applicability of this rule with respect to confidential drafting assistance. Part of the difficulty in comparing this rule to the various rules of court relates to definitions. Because “lawyer” is not defined in the various court rules acts, the definition in the *Interpretation Act*, R.S.B.C. 1996, Chapter 238 brings one back to the definition of practising lawyer in the *Legal Profession Act*, which refers to membership status and not the capacity in which the lawyer is acting. While the *Professional Conduct Handbook*, Chapter 10, Rule 10 qualifies the status of the lawyer with the descriptor “acts for a client only in a limited capacity,” the various rules of court do not contain modifiers to indicate whether a lawyer is acting in a limited capacity. Modifiers in the court rules’ context are usually limited to “lawyer of record” or a lawyer acting for or representing a client. The closest the rules of court come to addressing limited retainers is through the procedures for withdrawal. Providing clear definitions and guidelines for how limited retainer lawyers fit within the existing regulatory and court procedure framework is important.

The core regulatory issue is: if drafting assistance is to be anonymous, how can a lawyer providing confidential drafting assistance comply with *Professional Conduct Handbook*, Chapter 10, Rule 10? If the answer is that the rule does not apply to a retainer for confidential drafting assistance, because such services do not constitute *acting* for a client, then how are such services to be reconciled with other provisions in the *Professional Conduct Handbook* where it might be desirable to have confidential drafting assistance amount to acting for a client? If, on the other hand, confidential drafting assistance is acting for a client, how can confidential drafting assistance not mislead an interested person (i.e. at the very least confidential drafting assistance misleads people into thinking the self-represented litigant is the author)? It is not clear who constitutes an “interested person”, nor whether misleading is linked to a severity test.

The main approaches in the US are:¹²

1. the face of the document must disclose the lawyer’s name;
2. the face of the document must disclose it has been prepared by or with the assistance of counsel, or reviewed by counsel, but the name of the lawyer is not required;

¹² For a more detailed discussion, see, ABA Standing Committee on the Delivery of Legal Services, *An Analysis of the Rules that Enable Lawyers to Serve Pro Se Litigants* (April 2005).

3. there is no requirement to disclose the lawyers involvement if he or she is not appearing as counsel of record.

The dominant, though not unanimous, view arising from consultations with the BC Supreme Court Masters is that confidential drafting assistance does not present a problem. The lawyer providing such services is still bound by professional duties. This includes *Professional Conduct Handbook*, Chapter 1, Canon 2(3):

A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.

The word “attempt” suggests a conscious effort to mislead. The negligence standard covers the lawyer who falls below the level of a competent lawyer in a similar situation. Combined, these guiding principles establish a framework for drafting assistance under a limited scope retainer, and the vast majority of lawyers providing these services will fall within an acceptable range of practice. If the court finds that the document is improper, the court can advise the litigant and the litigant has the discretion to reveal the identity of the lawyer and/or file a complaint with the Law Society. As such, the Task Force endorses the concept that there be no requirement to disclose a lawyer’s involvement in drafting documents for a client as part of a limited scope retainer. The Task Force recognizes, however, that the present wording of the *Professional Conduct Handbook*, Chapter 10, Rule 10 may be insufficient to make it clear that confidential drafting assistance is permissible, and that it may be desirable to place an annotation or footnote to the rule clarifying the relation of the rule to the provision of confidential drafting assistance.

2.1.4 Should or does confidential drafting assistance, if disclosed to the court, constitute an entry of an appearance by the lawyer? And, is there a need for a rule regarding confidential drafting assistance and entries of appearance?

Even in US jurisdictions where there is a duty to disclose a lawyer’s “behind the scenes” involvement in preparation of a document, such disclosure does not generally constitute an entry of an appearance by the lawyer. However, signing pleadings does amount to an entry of an appearance in most jurisdictions, and many jurisdictions take the position that having entered an appearance, a lawyer has a duty to see the matter through to completion.

In its consultations, the Task Force asked members of the Bar if they would provide drafting services under a limited scope retainer if doing so could result in an entry of an appearance. The prevailing opinion was that lawyers would not provide such services. A recurring concern of lawyers the Task Force spoke with was the risk of being conscripted into a retainer that was broader than the one bargained for. This concern is particularly acute given that many of the clients who seek limited scope legal services are not able to afford legal services beyond the limited scope contracted for, and as a consequence, the lawyer is left shouldering the economic risk in circumstances where the lawyer is

required to provide ongoing legal services. The reality is that many lawyers face the same economic hardships as their clients, and it would be unfair to require these lawyers to bear the financial burden of subsidizing another individual's litigation. Lawyers indicated to the Task Force that they wanted to help litigants, but need clarity in the rules regarding the scope of obligations that are created when a lawyer provides limited scope services.

Recommendation #4 of the ABA Section of Litigation, *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, 2003 ("Modest Means Report") reads:

Allow lawyers to help otherwise pro se litigants to prepare pleadings, or allow lawyers to prepare those pleadings themselves, without requiring disclosure that a lawyer provided the assistance. Alternatively, require that the pleading reflect that a lawyer helped the litigant to prepare it without personally identifying the lawyer. *In any event, make it clear that, solely by providing such document-preparation assistance, a lawyer does not make an appearance in the case in which the pleading is filed.*¹³
[Emphasis added]

The authors of the Modest Means Report "recommend that jurisdictions that have not yet addressed this issue make it clear that courts should respect the limits of limited-representation agreements", and that models that allow for anonymous drafting assistance "implicitly preclude full-service conscription" (p. 77).

The Task Force is of the opinion that confidential drafting assistance, if disclosed to the court, should not constitute an entry of an appearance by the lawyer who provided the services. The Task Force also believes, that a new rule or policy statement is required to clarify that preparation of court documents under a limited scope retainer, absent more, does not constitute an entry of an appearance by the lawyer who prepared the documents.

2.1.5 Should there be a rule to the effect that a lawyer who provides drafting assistance under a limited scope retainer can rely on the client's representation of the facts?

The *Professional Conduct Handbook*, Chapter 1, Canon 3(1) states:

A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* is a safe rule to follow.

¹³ American Bar Association, Modest Means Task Force, *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*. Chicago: American Bar Association, 2003, at p. 144.

Canon 3(1) raises interpretive problems for lawyers providing drafting assistance under a limited scope retainer. It requires the lawyer obtain sufficient knowledge of the relevant facts and law before advising the client as to the merits and probable results of the client's cause. The language appears to be drafted with the assumption that the lawyer is operating under a full retainer. The facts that are relevant to a discrete issue will likely be fewer than the facts that are relevant to the matter as a whole. If the client's cause refers to the larger matter, then the Rule can be inconsistent with the idea of drafting assistance under a limited retainer. If the client's cause refers to the limited services for which the lawyer was retained, then the scope of the factual inquiry is restricted. However, "sufficient knowledge" suggests more than mere reliance on the client's representation of the facts; it suggests that in certain circumstances some digging will have to be done by the lawyer. This approach is bolstered by the CBA, Code of Professional Conduct, Chapter III, Comment 3, which reads:

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.

This is echoed in the Alberta *Code of Professional Conduct*, Chapter 9, Rule 3, Comment 2:

Occasionally, a client will specifically request that a lawyer provide an opinion 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 the lawyer lacks knowledge or experience is likely to be unreliable.

It is essential to communicate to a client the limitations that arise as a direct result of the scope of the retainer, and to honestly assess the ability to provide the client a worthwhile service under a limited retainer. The best practice will always be to confirm this in writing. There may be some situations where it is not possible to provide competent legal services under a limited retainer, and in such instances the lawyer should either decline to act, or accept that a certain number of uncompensated hours will have to be expended in order to provide competent legal services.

The extent to which a lawyer should be able to rely on the client's version of the facts is influenced by the quality of service expected of a lawyer. The *Professional Conduct Handbook*, Chapter 3, Rule 3 indicates:

A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which

would be expected *of a competent lawyer in a similar situation*. Without limiting the generality of the foregoing, the quality of service provided by a lawyer may be measured by the extent to which the lawyer:

(k) discloses all relevant information to the client, and candidly advises the client about the position of a matter, whether such disclosure or advice might reveal neglect or error by the lawyer. [Emphasis added]

These provisions indicate that the standard of competence is considered in the context of what is expected of a competent lawyer in a similar situation. The standard appears to require a situation specific analysis: in the case of drafting assistance under a limited retainer the situation, in broad terms, is that the lawyer is not providing full service. Sub-rule 3(k) requires the lawyer to disclose all relevant information to the client. There are two main ways to read this. The expansive reading would require the lawyer to disclose all information relevant to the client's cause; the restrictive reading would read the provision in the context of the phrase "of a competent lawyer in a similar situation", and therefore suggest that information which is relevant is contingent on the situation (i.e. a limited retainer to provide drafting assistance and the factual context of the client's situation). The standard of quality is based on what would be expected of *a competent lawyer in a similar situation*. The "situation", therefore, would appear to refer to the lawyer's situation vis-à-vis the retainer, not to the client's situation in the broader sense. This does not mean that the lawyer can compartmentalize his or her services to such an extent that no thought is given to the client's situation as a whole, and the risks the client faces. To give meaningful advice about a particular matter will require understanding how that matter is situated within a broader context, and therefore require some consideration be given to the broader context.

The difficult question then, is whether the standard of care of the lawyer expands or contracts in relation to the scope of the retainer. The Modest Means Report suggests:

The general consensus that emerges from ethics opinions and recent rule revisions is that a lawyer who prepares documents for an otherwise *pro se* litigant can not knowingly make frivolous allegations, but need not conduct an independent investigation of the facts beyond what the client tells the lawyer, unless the lawyer knows, or has good reason to know, that what the client is saying is false. In that case, the lawyer should conduct the additional investigation that the lawyer reasonably believes is warranted. (pp. 77-78)

The Task Force believes that a rule similar to the ABA recommended rule be adopted:

Allow an attorney who provides drafting assistance to an otherwise *pro se* litigant to rely on that person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney should make an independent reasonable inquiry into the facts.

The sufficiency of such an approach requires an analysis of various provisions of the *Professional Conduct Handbook*. For example, the *Professional Conduct Handbook*, Chapter 3, Rule 6 requires that:

A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.

The Task Force recognizes that importing new rules creates interpretation challenges, such as how the “knows or ought to know” standard meshes with a “has reason to believe” standard. A change to the limited retainer rule to encompass language similar to the ABA approach will have a ripple effect in the *Professional Conduct Handbook*, and care should be taken to ensure consistent standards are developed.

In order to facilitate delivery of limited scope legal services, it is essential that the various Court Rules Acts allow lawyers to provide limited scope services in a fashion that respects the bargain made between lawyer and client. Because a lawyer providing limited scope services may be required to make further inquiries into the facts, it is important that the lawyer be able to have access to the registry file. An example of interpretation problems that exist, at present, is Rule 20(10) of the Court Rules Act, Provincial Court (Family) Rules. Although a party’s lawyer may have access to the registry file, there is no definition of who the party’s lawyer is, and while it might be desirable to have the ghostwriting lawyer be “a party’s lawyer” for the purpose of Rule 20(10)(c), it will not be desirable to have the ghostwriting lawyer be the party’s lawyer for other sections of the rules.

APPENDIX “C” CONSULTATIONS

The Task Force conducted consultations both internal to and external to the Law Society.

3.1 Internal Consultations

The Task Force engaged in consultations with the various departments within the Law Society, including the Lawyers Insurance Fund to assess whether its recommendations raised concerns. In addition, the Task Force sought feedback from the Ethics Committee on its proposals. These consultations were important to ensure that the recommendations of the Task Force operate effectively within the policies and practices of those groups.

3.2 External Consultations

The Task Force conducted two major consultations with members of the Bar. The first consultation occurred on May 7, 2005 in Vancouver, and the second took place September 22, 2006 at 108 Mile House.

The Vancouver Consultation

Participants at the May 7, 2005, Vancouver consultation included representatives of community agencies, government, law libraries, lawyers in private practice and those practising public interest law, lay and elected Benchers, members of the Task Force on Unbundling Legal Services, and Law Society staff. The consultation provided feedback on what limited scope legal services were occurring, how they were being provided, and why it was taking place. The consultation also explored the challenges practitioners face in providing limited scope legal services. The first consultation provided a broad view of the topic that was useful to the Task Force in setting priorities and identifying issues.

The participants indicated that limited scope legal services were occurring in criminal, family, civil litigation, solicitors' work, and areas that did not fall conveniently into a particular heading. With respect to why lawyers were providing such services, the answers varied, and included that providing limited scope legal services allowed a lawyer to assist a client who would otherwise go without legal assistance, that it increases access to justice, and that the legal system is so complex that providing limited scope legal services can, to some extent, help simplify matters for the client.

Participants were also asked to discuss the risk, challenges and other issues associated with providing limited scope legal services. The principal headings identified by participants were: liability concerns, access and process concerns, Law Society regulatory concerns, and general concerns (e.g. regarding lack of research into the issue). Participants were asked to discuss the benefits of limited scope legal services, and identified that it provides greater freedom to the client, reduces costs, and can enhance access to justice. Further, the justice system benefits by having better informed litigants, and lawyers benefit by providing needed services to litigants in a framework that is responsive to the litigants' circumstances. Participants felt that the rules needed to be simplified, rather than complicated, when it comes to clarifying obligations in limited

scope retainers. Opinion as to the need for more forms or precedents varied: some felt it was not desirable to create more paperwork, whereas others felt simplified court forms and limited retainer forms would be useful. Concerns included avoiding having limited scope representation turn into *de facto* full representation, managing expectations, and standard of care issues.

The 108 Mile House Consultations

The second consultation took place on September 22, 2006 at 108 Mile House, where representatives from the Task Force met with members of the Cariboo Bar to discuss the Task Force's work. The consultation at 108 Mile House afforded an opportunity to dig deeper into limited scope retainers than the Vancouver consultation because participants were invited to discuss discrete issues the Task Force was exploring, such as limited appearances before the court, conflicts of interest, and communications issues in limited scope legal services. The discussion revealed that limited scope legal services were being performed in the Cariboo, but there is variance between what is permissible at various court registries. The most common concerns raised by participants were:

1. The lack of guidelines for lawyers to follow in providing limited scope legal services in a manner that protects against being the subject of complaints to the Law Society; and
2. How to provide limited scope legal services and not become subject to the requirement to provide a large number of unpaid hours of service to the otherwise self-represented client. Lawyers also had uncertainty about the extent to which a lawyer is required to advise the client about peripheral, yet important, aspects of the legal issue the lawyer was retained to address.

Lawyers practising in the Cariboo indicated that the geography of the region creates unique problems: individuals can travel for several hours by car to attend court, and this can make the cost of hiring a lawyer to engage in limited appearances prohibitive. Some lawyers questioned whether technology might facilitate limited scope legal services in circumstances where the client could appear and the court could call up the lawyer as or if needed.

Consultations with the Courts

The Task Force undertook several consultations with the courts. In its initial consultations, the Task Force spoke with Masters of the British Columbia Supreme Court to ascertain what their views were regarding limited scope legal services (discussed in the body of the Report). Subsequent consultations with the Courts followed the Task Force's consultation with members.

British Columbia Supreme Court:

The Task Force met with Chief Justice Brenner and Ms. Jill Leacock on July 12, 2007. The Chief Justice expressed his support of the work of the Task Force, and indicated that the Court always prefers to have counsel involved in a case, and that steps that can be

taken to increase representation before the Court would be appreciated. The Task Force discussed the concerns that had been identified in its discussion with lawyers, specifically, conflicts of interest and creating mechanisms to ensure that the limited scope of a retainer would be respected. The Task Force canvassed the idea of rules and forms being created to facilitate the provision of limited scope legal services, including expedited procedures for getting on and off the record, processes for drafting court orders, and clarifying matters relating to service and delivery of documents. The Chief Justice explained the time frame for the revision of the *Rules of Court*, and that the timing appeared to be good for discussing such issues. While the Chief Justice would be prepared to encourage justices to respect the modified conflicts of interest rules, should issues arise from the provision of Exempted Services, he suggested that the best approach would be to have legislative amendments.

Provincial Court of British Columbia:

Members of the Task Force met with Chief Judge Stansfield Associate Chief Judge Schmidt on October 17, 2005, and the Chief Judge met with the Task Force again on January 24, 2008. At the earlier meeting, it was observed that the Court has a fairly high degree of comfort that its processes work well for self-represented litigants in civil matters. Self-represented litigants in criminal matters presented a greater concern, however. It was pointed out that the system has to be viewed in two phases: 1) the settlement conference, and 2) the trial. It was noted that limiting what is required of a lawyer providing limited scope assistance would allow lawyer to feel they needn't take an overly defensive approach to the case.

At the second meeting the Chief Judge reiterated that while it is always beneficial to have represented litigants, the processes in Provincial Court are more amenable to self-representation. He did not feel there would be a principled, institutional opposition to lawyers providing limited appearances or behind the scenes assistance to self-represented litigants. The Task Force discussed the idea of the Court having a simplified, limited appearance form that would allow the court and the parties and counsel to know the scope of services the lawyers would be providing. The Chief Judge said such a form made sense, and suggested that it should be signed by both the lawyer making the limited appearance and the client. The Chief Judge said discussions would be required to ascertain its anticipated use, and observed that the *Professional Conduct Handbook* rules regarding withdrawal of legal services should still govern the provision of limited scope services.

British Columbia Court of Appeal:

Members of the Task Force met with Chief Justice Finch, Mr. Justice Donald and Mr. Justice Low on October 11, 2007. The Task Force discussed unbundling in the context of limited assistance before the Court of Appeal. The Justices indicated that it is preferable that a litigant receives representation, and that partial representation is preferable to none. The Justices did not feel that confidential drafting assistance presented a problem, though raised the concern that a litigant might alter the document and depending on the nature of those amendments it might raise concerns. Members of the Task Force suggested that a lawyer might be able to protect himself or herself by having a client sign off on a copy of

the document as provided, and to keep this on file for purposes of comparison should issues arise.

The Justices indicated that there are service issues regarding counsel of record, and the members of the Task Force indicated that they hoped simplified rules and precedents could be created for dealing with these issues. The members of the Task Force explained that it was the hope of the Task Force that the various levels of court would create rules and directives to facilitate limited appearances by counsel, and that the Law Society would create guidelines regarding how unbundled services can be delivered in a professional manner.

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¹⁴ This is a non-exhaustive list of materials the Task Force considered. Material, such as the various provincial Codes and Rules of Professional Conduct and the Canadian Bar Association, *Code of Professional Conduct* are not listed. Nor are all the US State Rules of Professional Conduct and Ethics Opinions that were considered listed. In addition, the Task Force considered the various British Columbia rules of court and case flow management rules.

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