PROPOSAL FOR PROTECTION OF COMMUNITY BASED LAWYERS PROVIDING DISCRETE TASK ASSISTANCE TO PARTIES IN THE SAME PROCEEDINGS

SUMMARY

The development of a uniform Legal Profession National Law and uniform National Rules for Solicitors and Barristers presents an opportunity to clarify the rules relating to professional responsibility for legal services that do not amount to full representation. In particular, consideration is sought of the liability of community legal centres engaging in discrete task assistance and the ability of community legal centres to provide free legal assistance to multiple parties in a dispute without attracting liability under conflict of interest rules. These issues have been brought into focus by QPILCH's self representation services.

Community legal centres often provide some form of 'unbundled' or discrete task assistance rather than full representation for disadvantaged clients. These 'limited' legal services raise issues of professional responsibility, such as a lawyer's liability where a self-represented litigant pursues baseless proceedings. While a number of States in the USA have facilitated unbundling of legal services through revised ethical and procedural rules, so far Australian professional and civil procedure rules have largely ignored these services. This unresolved issue can lead to reluctance by some lawyers to undertake pro bono discrete task assistance due to concerns of liability and thus limits the assistance which may be provided.

The other issue impeding access to justice by people who cannot afford a lawyer is the rules relating to conflict of interests. Community legal centres often provide one-off advice or referrals only, yet they are precluded from providing this service to other, often equally disadvantaged, parties in the same dispute. This means that, due to the limited number of community legal centres available, the other party is severely disadvantaged in their ability to gain free legal assistance.

QPILCH recommends that the proposed National Legal Profession Law and the National Solicitors' Rules acknowledge the increased provision of discrete task assistance through definitions and rules clarifying the consent of clients to these limited legal services agreements. The rules should also clarify and limit the liability of lawyers providing services limited to these discrete tasks with the consent of the client. QPILCH also suggests that the National Laws be amended to protect community legal centres from liability for perceived conflict of interest where they provide legal assistance to multiple parties in a dispute and where adequate protections from real conflicts are in place.

UNBUNDLING

What is unbundling?

QPILCH's triage and assistance scheme for litigants in person can be characterised as 'discrete task assistance' or 'unbundled service'. This type of legal service contrasts with traditional full service representation in that the client seeks help with a part of a process or proceedings and may not provide to the lawyer full information and background to the matter.

US experience

Unbundling provides more opportunities and options for litigants in person beyond full-service representation. In the USA, it is increasingly popular among lawyers and consumers, permitting lawyers to "create opportunities to serve an otherwise unrepresented and precluded market."[1]

There are three broad categories of unbundled legal assistance:

1. general counselling and legal advice;
2. preparation or assistance with drafting of documents or pleadings; and

[1] Herman, Madelynn, *Limited Scope Legal Assistance: An Emerging Option for Pro Se Litigants*, The National Centre for State Courts, 2003, 1.

3. Limited appearances before the court.

> For example, lawyers might draft pleadings, coach on strategy, role-play court appearances, research the law, write briefs, negotiate, prepare exhibits, organise discovery, draft agreements, or prepare orders.[2]

The American Bar Association commented on developments in court informational services:

> Many, if not most, litigants need more than the procedural assistance offered by these resources. They need to know more than which forms to use, how to docket their cases and what time to appear in court. They need assistance with decision-making and judgment. They need to know their options, possible outcomes and the strategies to pursue their objectives. In some cases, *pro se* litigants need advocates for some portion of their matter. These services can only come from lawyers.[3]

The ABA notes that input from lawyers not only assists the litigants, but also the courts, because the better the litigant is prepared, the more efficiently the court operates.

> While judges would no doubt prefer fully represented litigants, the choice in most venues is a self-represented litigant who is well prepared or one who is not.[4]

In January 2001, the US Conference of Chief Justices encouraged "expansion of the types of legal assistance to self-represented litigants, including exploration of the role of non-attorneys [paralegals]."[5] Some US states have even introduced guidelines for judicial officers to encourage unbundled services[6], and some state bar associations have called for an increase in the availability of lawyers to provide unbundled services.[7]

This has necessitated revision of professional rules governing the provision of legal services and some US states have changed court and professional rules to accommodate this new way of operating.

In February 2002, the American Bar Association amended Rule 1.2(c) to provide that:

> A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.[8]

As of 2003, 23 US states facilitate unbundling while 14 have raised concerns about its implementation.[9]

Ethical and civil procedure rules have been changed in some US states to enable lawyers to provide limited assistance at different stages in proceedings without breaching their traditional professional responsibilities to the court and to the client regarding the prosecution of a case with limited prospects and to provide assistance in a competent manner.

> The policy issues that have been addressed as a result of both of these initiatives thus far are:
> • Defining the scope of representation;
> • Clarifying communications between counsel and parties;

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[2] Ibid, p2
[3] American Bar Association, *An analysis of rules that enable lawyers to serve pro se litigants*, April 2005, www.abalegalservices.org/delivery, p5.
[4] ABA see note 21, p6.
[5] Quoted in Herman, see note 19, p2.
[6] Hough, B, *Twenty Things that Judicial Officers Can Do To Encourage Attorneys to Provide Limited Scope Representation*, Administrative Office of the Courts Judicial Council of California, www.unbundledlaw.org/states/twenty_things_that_judicial_offi.htm.
[7] www.unbundledlaw.org/Recommendations/Sourcematerials/BostonBar.htm.
[8] Quoted in Herman, see note 19, p3.
[9] See www.unbundledlaw.org.

- Creating parameters for the lawyer's role in document preparation, including disclosure of the lawyer's assistance;
- Governing the entry of appearances and withdrawals for limited representation; and
- Excusing conflicts checks for limited services programs.[10]

However, many lawyers are not willing to 'unbundle' their services and provide limited scope representation "although they typically do so when representing business interests and in transactional matters"[11], as particular issues of professional responsibility are not necessarily resolved.

There is some concern that unbundling will expose a lawyer to liability. An agreement between a lawyer and a client to undertake a limited task may impede a lawyer's duty to provide competent representation, which assumes inquiry into and analysis of the factual and legal elements of a case.

The ABA comments:

> If, by definition, competent representation necessitates some degree of inquiry and analysis and a lawyer may not limit representation to the extent that the representation exempts the lawyer from competent representation, then the logical conclusion is that a lawyer may not limit representation to the extent that the lawyer is excused from the obligation to conduct inquiry and analysis. Regardless of the intention of those drafting (and adopting) Model Rule 1.2(c), it would appear the outcome is one that handicaps the ability of the lawyer to limit his or her services and to compete with those who provide only legal information.[12]

There is also concern expressed by some US lawyers that the courts will not abide by the limitations contained in the retainer agreement.[13]

Discrete tasking can also potentially prejudice the other party. For example, an opposing party may rely on an undertaking by a lawyer performing a discrete task only for the litigant to subsequently refuse to honour it.

However, a fully informed client should be able to agree for a lawyer to undertake a part of a case for them so long as their lawyers is trained, aware of their obligations in performing such work and is protected against unjustifiable claims through clear professional rules. Procedures and rules can also be put in place to protect opposing parties.

As the ABA points out, discrete tasking does occur in some 'traditional' situations such as "the process of challenging a court's jurisdiction is in itself a limited scope of representation. Similarly, when a lawyer represents a client through the trial stage, but not on appeal, the scope of representation is limited."[14]

Specific US issues

Drafting

The rules of civil procedure typically require a lawyer who represents a party to sign the pleadings.

In some US states, this rule has been relaxed:

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[10] Ibid, p7.
[11] American Bar Association, *An analysis of rules that enable lawyers to serve pro se litigants*, April 2005, www.abalegalservices.org/delivery, p6.
[12] Ibid, p10
[13] Grilli, Nash, Fischer and Hough, *Report of Judicial Council of California, Family Law: Limited Scope Representation*, 2003 at www.unbundledlaw.org/states/Limited_scope_report.htm.
[14] See note 14, p6.

> While it is important to take steps to avoid frivolous litigation, the lawyer's obligation to certify pleadings is not consistent with the limited nature of document preparation. The state rules of civil procedure generally work toward preserving the dichotomy of full representation versus self-representation when placing the burden on the lawyer to make reasonable inquiry pursuant to this segmented service.
>
> Colorado and Washington have addressed this issue by permitting the lawyer to rely on the *pro se* party's representation of facts in most situations.[15]

The ABA quotes favourably an academic paper:

> Professor Jona Goldschmidt rebuts this idea in his law review article, *In Defense of Ghostwriting*, in which he notes that rules require the courts to liberally construe pleadings regardless of whether they are drafted by a lawyer or a litigant. Therefore, he concludes it is irrelevant whether the *pro se* litigant received the benefit of counsel in the preparation of pleadings.[16]

The Judicial Council of California takes the view that ghost-written documents do not deprive the court of its ability to hold a party responsible for filing misleading or deceptive pleadings.[17]

Other US states take different approaches:

> The Florida Rules of Professional Conduct state in the comment to Rule 4-1.2, "If a lawyer assists a *pro se* litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court which otherwise might be under the impression that the person, who appears to be proceeding *pro se*, has received no assistance from a lawyer.
>
> On the other hand, the California Rules of Court explicitly excuses the lawyer who drafts documents in a family matter from the obligation to disclose. [18]

In 2005, the Federal Court of Australia raised the prospect that all lawyers who work on a pleading should be required to include their name. After considerable debate, the idea was not implemented.

<u>Advocacy</u>
Some US states have also adopted special rules in relation to discrete advocacy services. New Mexico requires a lawyer who appears for a client in a limited manner to disclose the scope of the representation to the court, whereas in Maine an attorney may file a limited appearance on behalf of an otherwise unrepresented litigant but must state precisely the scope of the limited representation. In Wyoming, an attorney who has entered a limited entry of appearance shall be deemed to have withdrawn when the attorney has fulfilled the duties of the limited entry of appearance.[19]

Unbundling in Australia

The Australian environment has so far largely ignored the issue of limited scope representation, although it occurs extensively. For example, most free legal services (legal aid and community legal services) provide discrete advice in a range of ways in litigious matters on a daily basis, which, while generally not extending to discrete advocacy, nonetheless challenges the traditional concept of the lawyer representing a litigant from start to finish. Lawyers in private practice would also draft pleadings etc as a limited task for a fee.

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[15] See note 14, p13.
[16] See note 14, p13.
[17] See note 14.
[18] See note 14, p14.
[19] See note 14, pp5-17.

In Queensland, costs have been awarded against a lawyer who prosecuted a baseless case and while this case involved full representation, the risks of taking a limited role where the full details of the case may not be known, raises more keenly the concerns of lawyers. Lawyers assisting in cases where their role is limited fear an adverse costs order against them personally.

This concern is compounded because of recent Commonwealth changes to the immigration legislation which specifically provides for costs awards against practitioners who represent a client in baseless proceedings.

Federal Magistrate Grant Riethmuller has pointed out that discrete services from the FMC's perspective can create problems for the court and other parties such as changing addresses, details, and representation.[20] These problems can be potentially solved if rules are introduced to ensure that the nature and limits of discrete tasking are spelled out and default situations advised in advance.

QPILCH experience

QPILCH has had direct experience with this issue. At the request of one tribunal, we arranged solicitor and counsel for the purpose of cross-examination of the respondent's witnesses on behalf of a self-represented applicant. Four days had been allotted for cross-examination in proceedings that had been going on for some time (much longer than had been set down because of the inexperience of the applicant). The member had identified that the self-represented applicant would have most difficulty with this particular task. Counsel appeared to request a short adjournment to prepare. In preparing for the cross-examination, counsel and solicitor identified that the applicant had no prospects of success, so withdrew at the second appearance. While obviously not indicating to the tribunal why they withdrew, the lawyers felt that by assisting the hopeless case they would be in breach of their professional obligations. As a result, the tribunal was no better off in trying to save time with partial representation. The cross-examination then proceeded and again took considerably longer than originally anticipated. With confidence in their action, counsel may have been able to test the witness' testimony and elicit any contradictions or inconsistencies in their evidence, without breaching their duty to the tribunal.

Some matters are extremely complicated, making it difficult even for a dedicated and competent lawyer to fully understand the case. In such circumstances, the court should not be deprived of at least some professional attention and assistance in order to reduce the complexity and order the case.

CONFLICT OF INTEREST

Most community legal centres provide one-off advice to clients or refer clients to other providers, yet also observe strict rules about conflict of interest, limiting their ability to advise or refer the other, often also impecunious party to the dispute. This occurs in circumstances where the advice may have been provided by different volunteers at different sites, but because the legal centre has recorded the attendance of one party, cannot assist the other.

The ethical rules relating to conflicts apply to potential as well as actual conflicts, and so centres fear that a conflict will be perceived if they assist both parties, irrespective of the nature of the work done.

It is arguable that legal centres that provide such services should not be restricted in the same way as a law firm that provides traditional full service representation.

[20] Presentation to National Access to Justice and Pro Bono Conference 10-11 August 2006.

QPILCH's self representation service

As a case in point, QPILCH's Self Representation Service (Courts) (SRS) ensures that it meets its professional obligations and ethical standards by referring opposing parties to other services for assistance, despite the level or nature of the advice given to the client.

As long as the SRS is the only service of its kind in Queensland, some parties are denied assistance because another similar service cannot be found. By applying an unnecessarily strict conflict policy, the SRS might be preventing many litigants from accessing legal assistance.

The SRS seeks to address this issue by providing training and support to other community legal centres so that those clients can be redirected to other centres for assistance. The SRS has already been able to refer some litigants to Caxton Legal Centre for similar assistance. However, this is a limited avenue.

The problem is exacerbated in some cases where a serial litigant:

- brings proceedings against numerous other individuals who may also struggle to afford a solicitor; and
- have consulted a number of other community legal centres about their various legal issues, precluding their (potentially numerous) opponents from obtaining *any* free assistance.

Legal Profession National Law – Solicitors' Rules 2010 4 CONSULTATION DRAFT

The proposed national rules provide:

> **Conflicts concerning former clients**
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> 10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.
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> 10.2 A solicitor or law practice who or which is in possession of confidential information of a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:
>
> > 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or,
> > 10.2.2 an effective information barrier has been established.
>
> **Conflict of duties concerning current clients**
>
> 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.
>
> 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.
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> 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:
>
> > 11.3.1 is aware that the solicitor or law practice is also acting for another client; and,
> > 11.3.2 has given informed consent to the solicitor or law practice so acting.

> 11.3.3 For the purposes of Rule 11.3.2, where a client engages a law practice on a non-exclusive basis then that client is taken to have given the informed consent required by Rule 11.3.2
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> 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as permitted by Rule 11.5 or 11.6.
>
> 11.5 A solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client.
>
> 11.6 A law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.
>
> 11.7 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

We assume that draft rule 11.3.3 only contemplates the situation where two parties consult a lawyer at the same time on a non-exclusive basis, such as two parties to a conveyance. This does not assist CLCs which may have difficulty accessing a client and may lack the resources to obtain their consent.

RECOMMENDATIONS

There is currently a lag behind limited scope legal service activity in the consideration of lawyers' professional responsibilities. While not implemented in all states, several of the US models discussed above have resulted in action to widen the protection afforded to legal practitioners providing discrete task assistance.

There are two issues which require action to protect lawyers not providing traditional full service representation:

1. the provision of discrete task assistance (which includes diagnostic or referral service) without necessarily the benefit of all the facts;
2. the provision of brief but specific assistance, particularly in relation to conflicts of interest.

Discrete task assistance

<u>Solicitor/client agreements limiting representation</u>

In the first instance, before undertaking any discrete task assistance, both the solicitor and client must have agreed to the limited scope of representation to be provided.

The agreement should include the following:

- Representation may be limited in objectives and means. Scope of the limitation may be established by identifying the client's specific objectives and their means to achieving those objectives. Terms of representation may also specifically exclude certain means the solicitor would otherwise use to achieve these objectives, for instance if likely to incur excess costs.
- The limitation agreed to by the solicitor and the client must be reasonable in the circumstances. Consideration must particularly be given to the nature and complexity of the legal content and also to the timeframe for providing advice to the client.

- Any agreement to limited representation should accord with the principles of informed client consent, explicitly defining the effect of the client's consent.
- Involvement of the lawyer or legal service provider ends at the completion of the client's specified objectives. There must be uniformity in the clause predicating the end point of the practitioner's role to prevent their involvement continuing for more work than was originally agreed to or thought reasonable in the circumstances.

Inclusion of limited representation in practitioner guidelines

As with the US models, particularly the New Hampshire Rules of Professional Conduct, these considerations of limited representation could be incorporated into the new conduct rules. For instance, the r*ules* could include definitions of limited representation, the effect of a client's consent to such a limitation and a model consent form. In the New Hampshire rules, these provisions are included under the 'Client-lawyer relationship' section (limited appearance form attached as **appendix 1** and New Hampshire rules attached as **appendix 2**).

Duty to client

Discrete task assistance raises a range of considerations regarding the parameters of solicitor-client relationship.[21] In Queensland, the Solicitor's Rules include a general principle regarding relations with clients:

> Solicitors should…give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge.[22]

Under the Colorado Bar Association Rules of Professional Conduct, an agreement of limited representation does not exempt the lawyer from their duty to provide competent representation.[23] The Rules state instead that the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[24]

With the introduction of 'client agreements' to limited representation, coupled with some amendments to the Solicitor's Rules section regarding 'Relations with clients', sufficient protection should be afforded to lawyers and legal service providers who undertake discrete task assistance.

Increased client responsibility

As discrete task assistance becomes more widespread, greater responsibility must shift simultaneously to the client. A range of programs have been considered in the US to ensure clients have a sufficient understanding of the complexity of self-representation. These initiatives included:

- Hotlines for clients
- Websites (informational, 'email a lawyer')
- Instruction sessions on form completion and court procedures, with a review component at the end to ensure the client has understood the session

Pleadings

We do not consider it necessary or advisable for a lawyer or legal service provider that prepares a pleading to include their name on the pleading. As much work is now done electronically, it is impossible ultimately for lawyers who draft a pleading to control its content or use.

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[21] http://www.unbundledlaw.org/Recommendations/Sourcematerials/fordham.htm

[22] http://www.qls.com.au/content/lwp/wcm/resources/file/ebab47084578c22/legal-profession-solicitors-rules-v1-Jun07.pdf

[23] http://www.cobar.org/index.cfm/ID/20472/subID/22373/CETH//

[24] http://www.cobar.org/index.cfm/ID/20472/subID/22373/CETH//

Qualified immunity for lawyers
Statutory immunity should apply to exempt lawyers and legal service providers from liability where clients have agreed by informed consent to limited representation.

Conflict of interest

In providing referral services and discrete task assistance to an applicant, so long as adequate protections are in place, QPILCH and other CLCs are capable of developing a system that:

- is transparent to both parties about its processes – stipulating the individual in the office who is assessing their application and who is assisting the other and advising them of the proposed action;
- ensures Chinese walls are in place to prevent disclosure of client information and confidences;
- obtains the applicant's consent in the application form to the possibility that the other party may also be assisted and more specifically in cases involving a direct conflict;
- avoids the risk of divided loyalty by immediately terminating the service if a real conflict becomes apparent.

QPILCH proposes that amendments to either the draft rules could be used to protect community legal centres against complaints which relate to assisting multiple parties to a proceeding. This strategy has already been adopted in some jurisdictions in the United States, where professional rules regarding conflicts have been expressly relaxed for centres providing discrete task assistance, and where there is statutory protection from complaints of professional misconduct on those grounds.

Like most community legal centres, many QPILCH clients are assisted by solicitors drawn from a large pool of volunteers from a variety of firms. Although QPILCH maintains files for each of its clients, it is relatively easy for the SRS for example to ensure that volunteers from any one firm do not assist more than one party to a proceeding. Volunteers only have access to client files during the client appointments, and only to the files of clients that they will be assisting.

Perhaps the best protection would be provided by an amendment (or clarification) in the rules specifying that a community legal centre, providing discrete task assistance rather than full representation, would not fall foul of the rules by providing advice or assistance to multiple parties to the same proceedings as long as reasonable steps were taken to ensure the same solicitor/volunteer did not assist more than one party to the same (or related) proceedings.

A new rule 11.3.4 could be added that enables a CLC to provide in the 'terms and conditions', to which the client consents, a clear explanation of its right to assist the other party in circumstances where a conflict is avoided.

In addition, the Bill could allow the Ombudsman to dismiss such complaints and give reassurance to community legal centres that assisting multiple parties (in a responsible way) is unlikely to amount to unprofessional conduct or professional misconduct.

APPENDICES

Appendix 1: State of New Hampshire Judicial Branch model consent form – Limited Appearance or Withdrawal by Attorney.

Appendix 2: Rule 1.2 of New Hampshire Rules of Professional Conduct – Client Lawyer Relationship: Scope of Representation and Allocation of Authority between Client and Lawyer.