

Unbundling Legal Services

In recent years, the idea of providing legal services under limited scope retainers, sometimes referred to as “unbundled” legal services, has emerged as a promising option for potentially improving access to justice.

Limited Scope Retainers

A limited scope retainer is one where lawyers¹ provide legal services for part, but not all, of a client’s legal matter, by agreement with the client.² Unbundling involves taking a legal matter apart into discrete tasks.³ The lawyer may provide limited legal services or representation with respect to some of the tasks, such as general counselling or advice, providing legal information, drafting or reviewing documents or pleadings, negotiating, or making limited appearances in court. With respect to all the remaining tasks not undertaken by the lawyer, the client is self-represented.

The concept of limited scope retainers is not entirely new. Lawyers have long given independent legal advice to clients on discrete issues, or have acted as duty counsel. What makes the phenomenon different today is that the practice has become much more widespread than before and, as the CBA has noted, “the conditions which make unbundling desirable from a client perspective have grown in recent years and seem likely to continue to grow”.⁴

Drivers of Unbundling

Limited scope retainers first arose in the United States largely as a way of lowering the cost of litigation, especially in the area of family law. There, and later in Canada, people who did not qualify for legal aid and who were unable or unwilling to pay a lawyer for full representation began to seek professional help for at least some aspect of their legal

¹ In some jurisdictions, paralegals can also provide certain legal services to clients.

² Law Society of Upper Canada (LSUC), *Rules of Professional Conduct*, Rule 1.02

³ ““Unbundling” of Legal Services and Limited Legal Representation”, Background Information and Proposed Amendments to Professional Conduct Rules, September 2011, LSUC (LSUC Background Report on Unbundling).

⁴ Canadian Bar Association, *The Future of the Legal Profession: The Challenge of Change* (Ottawa: CBA, 2000) at 71.

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problems.⁵ By limiting the amount of work done by the lawyer, the client could pay a lower fee.

But, people also choose to self-represent for reasons other than financial necessity. As the Law Society of British Columbia has pointed out in its report on unbundling in 2008:⁶

... [P]art of the rise in self-representation reflects a cultural shift that is taking place in the information age. ... Legal information is now easily available to those with access to the Internet. ... Many of these litigants will not see the value in hiring a lawyer to collect and process information they might easily collect themselves. Some will feel they need little or no help from a lawyer when it comes time to advance their case in court.

Whether litigants choose to self-represent out of necessity or personal preference, they often come to recognize that they need, or would benefit from, professional legal help from time to time. Lawyers began to offer limited scope retainers to meet the demand for this new type of service, usually on a fixed fee basis.

Advantages of Unbundling

As Beg and Sossin say, unbundling offers a half way house between full representation and no representation.⁷ Access to justice does not necessarily require access to a lawyer, but there is no doubt that in many circumstances lawyers play an indispensable role in the administration of justice. A number of studies have shown, for example, that the outcomes for self-represented litigants are not as favourable as those for parties with counsel.⁸ Where the traditional model of full solicitor-client representation is either not possible or not wanted, making at least some professional legal help available to people at a cost they can afford is thus highly desirable.

The practice of offering unbundled services at a flat fee is attractive to clients, as well. It makes it easier to estimate total costs, and eliminates the uncertainty that accompanies hourly billing. It also facilitates comparison shopping.

Unbundling also empowers those who want to maintain control of their own files to the extent possible. It plays to the strengths of individual clients; the lawyers can offer help that complements the knowledge and skill sets of each person.⁹

⁵ Samreen Beg and Lorne Sossin, "Should Legal Services Be Unbundled?", in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 197 at 202.

⁶ Report of the Unbundling of Legal Services Task Force, "Limited Retainers: Professionalism and Practice" (Vancouver: Law Society of British Columbia, 2008).

⁷ Beg and Sossin, *supra*, note 5 at 197.

⁸ CBA, *supra*, note 4 at 72; Beg and Sossin, *ibid.* at 198-99.

⁹ Beg and Sossin, *ibid.* at 199.

Not only will unbundled legal services likely improve the results for clients, but the courts will benefit, too. Clearer pleadings, sharper definition of issues, more logical arguments, better legal research – whatever the lawyer offers the unrepresented litigant will undoubtedly increase the efficiency of the court system.

Unbundling offers market opportunities for lawyers, as well. Clients who previously attempted to navigate the legal system alone and unrepresented now seek advice and representation from lawyers. As this demand evolves, lawyers will adapt and fill the niche.¹⁰

Concerns About Unbundling

From the outset, those who have studied unbundling have flagged the “practical and ethical concerns”¹¹ that arise as the rules and principles crafted for the traditional model of full solicitor-client representation have to be adapted to very new circumstances. The major concern identified by the CBA in 2000 was that lawyers will be acting for clients based on inadequate information, which might lead to worse results for the client and complaints or negligence claims against the lawyer.¹² Thus, under the codes of professional conduct, a lawyer is supposed to have sufficient knowledge of the facts before offering an opinion. For instance, Rule III(3) from the CBA Code says that:

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.

There is a danger that the level of inquiry necessary to be assured of the facts is not consistent with the restricted notion of the retainer involved in unbundling.¹³

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

The primary criticisms of unbundling fall into three broad classifications – concern that courts and judges might be misled, that clients might be misled, and that clients might make mistakes.¹⁴

¹⁰ CBA, *supra*, note 9 at 72.

¹¹ *Ibid.* at 71; Beg and Sossin, *supra*, note 5 at 196, 202-207.

¹² CBA, *ibid.* at 74-75.

¹³ *Ibid.* The CBA concluded, however, that the ethical duty could be reconciled with a limited scope retainer. Although one might take Rule III(3) to affirm the lawyer’s obligation to offer well-informed advice, equally, one might take it to recognize that the lawyer and client can agree that the lawyer’s role is limited and the advice is to be based on incomplete information.

If a judge is misled into believing that a litigant is fully self-represented, for example, he or she might extend greater leniency to the litigant than if the judge knew that that person's pleadings and argument had actually been "ghost-written" by a lawyer.¹⁵

The Law Society of Upper Canada summarized the concerns expressed by law societies and regulators as including:¹⁶

- lack of clarity about the agreement between the lawyer and client
- ensuring that the quality of unbundled legal service meets a high standard
- the possibility that lawyers will be acting for clients based on inadequate information
- whether the lawyer's assistance must be disclosed
- the risk that either the client, the court or opposing counsel could be misled
- uncertainty surrounding the ethical rules that apply

Doubt has sometimes arisen, for example, over the ethical rules that apply to communications with a self-represented litigant who is receiving unbundled legal services. Can opposing counsel deal directly with that litigant? If so, under what circumstances?

Other uncertainties have also been identified. Will the court allow counsel to withdraw after completing the agreed-upon services under a limited scope retainer? Or will the court regard him or her as counsel of record and require that lawyer to continue representing the client?

Response of Law Societies and Regulators

Regulators of the profession in both the United States and Canada have responded to these and related challenges. Recognizing the reality that lawyers are already offering unbundled legal services, that the trend is likely to increase, and that, properly done, unbundling can safely enhance access to justice, law societies have moved to provide guidance and clarity to lawyers and clients alike. As of 2010, 40 states in the United States had adopted rules that addressed many of the practical and ethical concerns identified in the preceding section.¹⁷ In Canada, the law societies in British Columbia, Ontario, Alberta and Nova Scotia have all studied limited scope retainers and have issued reports or adopted rule changes to deal with these issues in differing degrees. The CBA also issued a report on unbundling in 2000.

¹⁴ Forrest Mosten and Lee Borden, "Unbundled Legal Services" (paper presented at the Academy of Family Mediators 2000), quoted in "LSUC Background Report on Unbundling", *supra*, note at 3 at 3.

¹⁵ See, Proceedings from the First National Conference on Unbundling, October 12-14, 2000, Baltimore, Maryland. <http://www.unbundledlaw.org>

¹⁶ LSUC Background Report on Unbundling, *supra*, note 3.

¹⁷ Beg and Sossin, *supra*, note 5 at 203.

The Law Society of British Columbia published a comprehensive report on unbundling in 2008. It made numerous recommendations, including:¹⁸

1. rules that govern professional conduct and procedure before the courts should be amended as required to facilitate the proper, ethical provision of limited scope legal services.
2. lawyers providing limited scope legal services should meet the high standards of professional responsibility normally expected of a lawyer
3. if the lawyer does not feel the professional services contemplated by the limited retainer can be performed in a competent and ethical manner, the lawyer should decline the retainer.
4. the lawyer should ensure the client understands the limited scope of the retainer, the limits and risks associated with such services, and should confirm this understanding, where reasonably possible, in writing.
5. a lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.
6. unless otherwise required by law or a court, the discretion to divulge the identity of the lawyer who provided drafting assistance should lie with the client.
7. a lawyer may communicate directly with a client who has retained another lawyer to provide limited scope legal services, except if all three of the following factors exist:
 - a. the lawyer has been notified of the limited scope lawyer's involvement;
 - b. the communication concerns an issue within the scope of the limited scope lawyer's involvement; and
 - c. the limited scope lawyer or his or her client has asked the lawyer to communicate with the limited scope lawyer about the issue in question.
8. subject to certain exceptions, the regular rules governing conflicts of interest and duty of loyalty should apply to limited scope legal service retainers.

The Law Society of Upper Canada has also issued a lengthy report and amended its rules of professional conduct, emphasizing the need to provide competent service and to communicate effectively with clients when providing limited scope legal services.¹⁹

Best Practices

A number of best practices have developed over time to improve the quality of unbundled services and to mitigate the ethical risks involved in this new service delivery model. A fundamental issue is to ensure that the client is genuinely fully informed about the nature of the arrangement and understands clearly what services the lawyer will provide, and those

¹⁸ *Supra*, note 6 at 6-8.

¹⁹ See LSUC *News Release*, September 22, 2011, summarizing key changes in proposed rules of professional conduct in Ontario.

that he or she will not, under the limited scope retainer. The CBA argues that “a clear retainer letter is wise in any case; for unbundled legal services it is essential”.²⁰

One of the best practices in this area is the model retainer agreement created for family law matters that lists, say, all 17 activities that need to be done on a particular file.²¹ The specific services to be performed by the lawyer are initialed (e.g. legal research). Those not checked off become the responsibility of the client personally (e.g. contacting and interviewing witnesses). Thus, once the limited scope engagement agreement is signed, it is clear who is responsible for what. Therefore the agreement not only serves to define the lawyer’s role, but also tells the client the other steps that need to be carried out.

Conclusion

Beg and Sossin conclude that “while only one piece of a massive puzzle, unbundling in our view represents a significant and positive step toward a more accessible civil justice system”.²² They acknowledge that unbundling is not without risks both to litigants and to lawyers, but still believe that the potential benefits outweigh the potential downsides.²³ They urge changes both in the regulatory culture and the business model of the legal profession to achieve this.²⁴

The CBA reached a similar conclusion in 2000, saying that, despite understandable nervousness because of unsettled issues of liability, it should still be possible to unbundle legal services in a way that minimizes the risk both to clients and lawyers.²⁵

There is little doubt that greater resort to unbundling, cautiously managed, can enhance access to justice. As familiarity with the concept grows, and experience accumulates, it seems very likely that more “best practices” will develop, and the remaining risks and uncertainties will decrease, if not entirely disappear. This is to be applauded.

²⁰ CBA, *supra*, note 4 at 77.

²¹ *Ibid.*

²² Beg and Sossin, *supra*, note 5 at 221.

²³ *Ibid.* at 221.

²⁴ *Ibid.* at 193.

²⁵ CBA, *supra*, note 4 at 78.