Unbundling Guidelines

The Law Society OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

Introduction

In connection with the rendering of legal services, the terms "unbundling" or "unbundled" are used to denote discrete events of legal work, as distinct from the performance of an entire retainer from beginning to end. "Unbundling" literally means breaking down an entire matter into its constituent parts, so that each part of the total "bundle" becomes a matter in its own right. How matters are unbundled in individual cases is a question for the practitioner and the client to agree. For instance, a number of constituent parts may be bundled together depending on the agreement.

Entire retainers usually start with the taking of the initial instructions, followed by the rendering of all necessary services until the conclusion of the case or the transaction. Unbundling is a term used in connection with all types of legal services, ranging across every kind of litigation and commercial or corporate work. These guidelines use the phrase "limited retainer" as a convenient way of describing a client agreement for unbundled services, as distinct from entire retainers.

Why do clients seek unbundled services?

There is a variety of reasons why clients may require unbundled legal services, including the following.

- A client may want a practitioner to deal with only an aspect of a matter because the client cannot afford the cost of full legal representation
- A client may want a practitioner to act on a particular aspect of a matter because the practitioner is an acknowledged expert in a particular area of law, or the client lacks the confidence to act personally
- A client may be seeking a second opinion on a matter (or aspect of a matter), where lawyers are already acting in relation to the entire matter
- A client's existing lawyers may have a conflict of interest preventing them from acting on a particular aspect (or aspects) of a matter, necessitating a limited retainer in relation to that aspect.

When might unbundling be appropriate?

In areas of law where clients generally may have modest means or limited resources, e.g. personal injury, criminal law, family law, the collection of small claims and generally in relation to small business, a limited retainer may be in the client's best interests. It may serve the client's interests by limiting costs and providing access to justice, which they might otherwise be unable to achieve.

Examples of unbundled legal work[1]

- Advising litigants in person on courtroom procedures and behaviour
- Scripting appearances for litigants in person
- Working with and providing support to solicitors on the record
- Conducting legal research on discrete aspects of a matter
- Document reviews
- Drafting contracts
- Drafting court documents, including pleadings, notices, briefs, witness statements etc.
- Conducting aspects of a due diligence
- Providing a second opinion
- Making limited court appearances
- Attending court as the instructing solicitor on limited court appearances
- Negotiating
- Organising discovery materials
- Preparing exhibits
- Lodging company or business forms
- Lodging documents at the Titles Office
- Advising on the lodgement of documents

Risk exposure

The common thread running through each of the above examples is the practitioner's lack of context or continuity i.e. the absence of complete knowledge of the entire matter. Usually a practitioner would expect to be fully instructed on every relevant aspect of a matter so that he or she can best represent the client's interests. But where a practitioner is asked to agree to provide unbundled services, the client may be reluctant to brief the practitioner fully to save costs or time. In those circumstances, practitioners must exercise their own judgement as to the sufficiency of the instructions needed to adequately discharge their retainer.

That statement begs the questions why, or whether, a practitioner should ever accept the higher level of risk that limited retainers inevitably bring, without establishing clear self-defensive measures from the outset.

Bearing in mind a practitioner's duties to the court, the administration of justice and to the client[2], potential for higher exposure to risk is inherent in agreeing to limited retainers. The natural result of the limited involvement inherent in unbundled work is an absence of exposure to the full picture, focussing only on a narrow aspect, without the benefit of all facts and circumstances.

Where a practitioner is being retained for only a discrete task,

the client may not fully inform the practitioner – for reasons of time, cost or relevance. In such cases, the practitioner's duties are twofold: first, to **ensure that the client is fully informed about the constraints of a limited retainer; and second, to ensure that the practitioner acts in conformity with the law and the professional conduct rules.** The fact that a practitioner has agreed to a limited retainer does not diminish the practitioner's professional duties. On the contrary, practitioners must be sensitive to the fact that a limited retainer may attract an additional burden to ensure that evidence exists on the record to show that there has been a complete and proper discharge of professional duties. This means that practitioners who take on limited retainers must be careful to ensure that those matters are always managed consistently with the retainer agreement reached with the client.

The core question

The core question is how a practitioner should cope with a lesser level of involvement and awareness inherent in an unbundled matter?

The obvious risk

The obvious risk of not taking measures, for the protection of both the practitioner and the client, is the rendering of inadequate services in the absence of the full picture.

The consequences of a failure to take steps consistent with a practitioner's professional obligations in relation to limited retainers would be likely to include exposure to common law negligence claims or referral to the Legal Profession Complaints Committee, or both.

Practitioners' duties

Whether or not there is a limited retainer, the practitioner must discharge all applicable professional and legal duties. These encompass not only the professional conduct rules, but contractual, tortious and fiduciary duties arising from the solicitor client relationship. It follows that practitioners who undertake limited retainers must take care to ensure they discharge their duty of care to their clients.

Limiting the scope of a retainer

Legal practitioners who undertake limited retainers must ensure that the limitation of the scope of the retainer is reasonable under the circumstances and the client must give consent: *Minkin v Landsberg* [2015] EWCA Civ 1152[33]. Relevant circumstances include, for example, the sophistication of the client and the nature of the services to be rendered. It follows that the practitioner's management of the limited retainer is critical from the outset.

What practitioners must do if contemplating accepting a limited retainer

1. Practitioners must have a full and frank discussion with the prospective client at their first meeting about the nature of their ongoing practitioner client relationship, especially the client's expectations and requirements.
2. Practitioners should ensure that they understand the nature of the matter and the services they are being asked to render.
3. At the first conference, practitioners should ask the prospective client about the extent of the instructions or information the client is willing to provide.
4. When considering entering into a limited retainer agreement, the practitioner must consider the ethical and professional duties arising from the practitioner's role under a limited retainer. These include:
    - Advocacy obligations
    - Solicitor's obligations
    - Special obligations with respect to criminal law matters
    - Special obligations with respect to family law matters
    - The practitioner's ability to discharge obligations to the court and the administration of justice under a limited retainer agreement
    - The practitioner's ability to discharge the duty of care to the client under a limited retainer agreement
    - The practitioner's ability to discharge any or all of the duties stipulated under the professional conduct rules
    - The practitioner's ability to discharge contractual, fiduciary and tortious duties arising from a limited retainer agreement
    - In litigation matters, the obligation to explain the meaning of case management objectives
    - The obligation to explain to the client any costs implications, especially any liability for adverse costs orders.
5. The retainer agreement must always be in writing. The practitioner must explain this to the prospective client at the first meeting.
6. The scope of the legal services to be rendered must be accurately and precisely scoped and described in the retainer agreement, leaving nothing to doubt. The retainer agreement must make it clear that the practitioner is only agreeing to act within the scope of services stipulated in the agreement.
7. A practitioner must reflect on and if necessary include the following matters when drafting the retainer agreement:
    - Whether it is possible for the practitioner to perform the limited retainer
    - Whether it is necessary to incorporate provision for interacting with the other practitioner(s) acting for the client
    - Whether the practitioner is required to limit communications exclusively to the client, or whether communications to the other practitioner(s) acting for the client are permitted or required
    - Whether any special provision must be made to protect the client's legal professional privilege
    - Whether any conflicts of interest are likely
    - Whether it is possible to limit the practitioner's liability
    - The impact of proportionate liability and the Civil Liability Act
    - Whether the practitioner will be responsible for accepting service of process and other documents including court documents and the obligations that flow from that
    - In the case of court appearances, whether the practitioner will act as an advocate or an instructing solicitor

- Any costs implications, including the client's liability under adverse costs orders
- Whether any proposed clauses could potentially make the proposed retainer agreement into an unfair contract and thus void under the Australian Competition and Consumer Act
- The availability of a complaints procedure.

8. The practitioner must ensure that the prospective client is fully informed about the legal services that will and will not be rendered under the limited retainer agreement.
9. The practitioner should explain that the client is at liberty to take independent advice in relation to the provisions of the limited retainer agreement.
10. The retainer agreement should contain an acknowledgement that the client is aware of the limitations of the retainer and the possible impact on any advice given.
11. The practitioner should ensure that the explanation of the scope and terms of the limited retainer are recorded in writing in a contemporaneous file note and immediately afterwards confirmed by letter or email (or both) to the client.
12. The retainer agreement must, if possible, allow the practitioner the ability to seek further information from the client from time to time to the extent that it is reasonably necessary for the practitioner to render the services required.
13. Any request to a party for further information should be communicated to the client in writing.
14. Before drafting a limited retainer agreement, a practitioner should reflect on the implications of the unfair contracts amendments to the Australian Competition and Consumer Law.[3]
15. Generally, practitioners must take special care to proactively manage the limited retainer relationship from the beginning to the end, so that there is no room for a misunderstanding or a dispute later with the client.
16. As the limited retainer takes its course, the practitioner should regularly refer the client back to the terms of the limited retainer document, for example, when explaining that certain aspects of work are not covered by the terms of the limited retainer.
17. The practitioner should be wary of rendering legal services that, by conduct, without express agreement, have the legal effect of expanding the scope of the limited retainer.
18. If the client asks the practitioner to perform services not covered by the limited retainer, the practitioner should inform the client that it is not within the scope of retainer and the practitioner is not obliged to render the additional services. However, the practitioner may negotiate an additional retainer with the client to perform the additional services.
19. If a prospective or current client asks for a limited retainer, the practitioner must warn the client of any disadvantages of doing so.
20. The practitioner must consider the professional indemnity insurance implications of regularly accepting limited retainers. The practitioner should make disclosure to the insurer of this practice.

When should practitioners not accept limited retainers?

1. If you have a concern that it is inappropriate to limit the retainer in the circumstances.
2. If you think that your client does not understand the implications of entering into a limited retainer.
3. If you think that you cannot act because it would be difficult or impossible to take full instructions.

Reading material

http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/

https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/May-2016/Practice-management--Unbundling

http://www.americanbar.org/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services.html

http://www.lsuc.on.ca/unbundling/

NOTES:

1. This does not purport to be an exhaustive list.
2. Legal Profession Conduct Rules 2010 (WA).
3. Introduced in November 2016.