NEW ZEALAND LAW SOCIETY

NZLS EST 1869

PRACTICE BRIEFING

Guidance to lawyers considering acting under a limited retainer

INTRODUCTION

This practice briefing is intended as a guide to good practice for lawyers undertaking limited retainers (also known as "unbundled" legal services).

A limited retainer is where a lawyer, by agreement with a client, performs one or more discrete tasks, while the client handles other matters that, in a traditional full service retainer, would form part of the services the lawyer would provide.

What has been described as a "justice gap" is growing between those who can afford to pay for traditional legal services and those who cannot. One suggested means by which lawyers can address this growing justice gap is through the provision of limited or "unbundled" legal services, in particular to clients who at least partly represent themselves in court.

"DIY" LAW?

More litigants in person (LiPs) are appearing before the courts, and more individuals are demonstrating a preference toward taking greater control over their own legal affairs. This "do it yourself" law culture is encouraged by the growth of self-help legal websites, community services, and information/form databases (such as *JustAnswer.com*). The use of Artificial Intelligence in the legal industry is also on the horizon.

The Ministry of Justice website provides information about self-representation in the different courts (see *https://www.justice.govt.nz/courts/going-to-court/without-a-lawyer/*.)

Elements of self-help and the limited retainer service model are not new. Executors frequently request a lawyer to apply for probate, but then carry out the rest of the legal work themselves. Limited service retainers are increasing in the field of family law, where recent changes make limited representation in the Family Court the norm.

Encouraging "do-it-yourself" solutions for clients who are willing and capable of taking greater control over their legal affairs can help to alleviate not only the financial strain on families and individuals in need of legal services, but also administrative strain felt by the wider legal system.

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CASE LAW-THE DUTY OF CARE

There is not yet any New Zealand case law on limited retainers. However, a recent decision of the United Kingdom Court of Appeal held that lawyers do not have a broader duty of care when offering unbundled services. The Court in *Minkin v Lesley Landsberg* [2015] EWCA Civ 1152 dismissed a professional negligence claim brought by a client against a family lawyer, with Lord Justice Jackson saying that **solicitors acting under a "defined and limited retainer" do not owe a broader duty of care to clients that goes beyond the terms of the retainer**. Jackson LJ stressed that, where unbundled services are offered and limits of liability are clearly defined, a lawyer will not be held responsible for issues arising in relation to the client's legal proceeding but outside of the lawyer's scope of responsibility.

While lawyers do not, according to *Minkin*, have a broader duty of care when offering unbundled services, care needs to be taken by a lawyer to ascertain the exact scope of the retainer consistent with their professional and ethical obligations. The scope will inform the breadth of the duty of care in a particular situation.

This was highlighted in a 2013 Queensland Supreme Court case, *Robert Bax and Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476 [490]. In that case, the solicitor argued that he was only engaged to prepare and stamp mortgage documents. The court held that a letter written by the client's bank manager to the solicitor was evidence of a more extensive retainer, and that the scope of the retainer extended to providing advice as to the most effective method to protect the client's interest in the financing transaction. The court also found that the solicitor could not undertake the retainer "without ascertaining the extent of the risk the client wished to assume in the transactions, evaluating the extent of the risks involved in the transactions and advising in that regard". Further, the court found that the duty to advise "does not depend on advice or information being specifically sought by the client".

Considerations that are relevant to the duty of care lawyers owe their clients in limited retainers were detailed by Chief Justice McClelland in *Trust Co of Australia v Perpetual Trustees WA Ltd and Others* [1997] 42 NSWLR 237 [247].

"The duty of care owed by a solicitor to his client is to exercise reasonable skill and care," Chief Justice McClelland said.

"What is required for the performance of this duty in a particular case depends on:

- the scope of the solicitor's retainer,
- the scope of any additional responsibility assumed by the solicitor and relied on by the client,
- the nature of the task entrusted to or undertaken by the solicitor, and
- the circumstances of the case."

HOW CONDUCT AND CLIENT CARE OBLIGATIONS APPLY

These cases, particularly *Robert Bax*, highlight the importance of lawyers turning their minds to

the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 (RCCC), and how they apply to limited retainers.

The preface to the RCCC summarises the building blocks on which a lawyer's obligations to his or her clients are built:

"Whatever legal services your lawyer is providing, he or she must —

- act competently, in a timely way, and in accordance with instructions received and arrangements made:
- protect and promote your interests and act for you free from compromising influences or loyalties:
- discuss with you your objectives and how they should best be achieved:
- provide you with information about the work to be done, who will do it and the way the services will be provided:
- charge you a fee that is fair and reasonable and let you know how and when you will be billed:
- give you clear information and advice:
- protect your privacy and ensure appropriate confidentiality:
- treat you fairly, respectfully, and without discrimination:
- keep you informed about the work being done and advise you when it is completed:
- let you know how to make a complaint and deal with any complaint promptly and fairly."

These obligations apply equally to all legal services provided to a client- even when these are limited.

The wording of one of British Columbia's rules of conduct for lawyers provides useful advice. It states:

"When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services."

BENEFITS FOR LAWYERS

Some of the potential benefits of limited retainers for lawyers are:

- Increasing market share while also addressing the legal profession's commitment to facilitating greater access to justice.
- A potential source of clients who want and are able to handle their legal affairs themselves, but are willing to pay for limited expert guidance.

- Improving the quality of legal services by focusing on efficiency and the client's core legal needs.
- More affordable and predictably-priced legal services for clients, which tends to increase satisfaction.
- Fewer unpaid legal bills and associated debt recovery.
- Enhanced job satisfaction for lawyers who may not enjoy the full-scope practice model and who want to reduce the demands on their legal practice. Lawyers might be able to work part-time, or from home. This may reduce professional stress.
- A reduction in fee-related complaints. A limited retainer can reduce client dissatisfaction, as consumers know clearly what they are and are not getting. Clients are less likely to blame their lawyer for any disappointment arising from the outcome of their legal issue.
- Greater ability to manage client expectations and enhance clients' perceptions of value retained and received.

BENEFITS FOR CLIENTS

- Increased access to justice. Many people can afford to pay something, but cannot afford the full representation approach.
- Expert legal assistance that can help a client navigate a system that is often complex and difficult for a lay person to understand.
- Clients are empowered. They have more control over their own legal affairs, and can exercise control over those parts of the file they feel comfortable handling.
- Price predictability.
- Greater ability for a wider section of civil society to access the justice system to resolve their legal disputes or issues.

SOME EXAMPLES

The following is a non-exhaustive list of areas of law where it might be appropriate for a lawyer to offer services under a limited retainer. The list is indicative only, and not intended as a substitute for each lawyer's own professional judgement. In all cases, the practitioner must consider the appropriateness of unbundling their services by having regard to the circumstances of the case, the client, the complexity of issues involved, and the relative risks and benefits (to the client and lawyer).

- Drafting initial pleadings and affidavits.
- Participating in one-off court appearances, such as: conducting interlocutory applications, appearing in pre-trial or case management conferences.
- Strategic advice regarding a specific stage of the legal process, such as filing an initial application, or statement of defence, or the grounds for and likely success of an appeal.

- Applying for probate.
- Providing one discrete piece of advice within a larger legal matter, for example checking a letter to be sent to an employee in an employment dispute.
- Document review, preparation or filing.
- Factual investigations.
- "Coaching" a client to appear in court on their own behalf, or to present a case to the Disputes Tribunal.
- Providing guidance on how to independently instruct an expert.
- Settlement negotiations and conferences, mediations, or other types of clearly limited dealings with the opposing party.

RISKS FOR LAWYERS

Unbundling your legal services for your clients can be risky. Because clients remain "in charge" of their own legal issues, responsible for proceeding their case themselves, there is a risk that they will be required to make decisions about legal matters with which they are unfamiliar. And, as the lawyer's access to relevant information about the matter depends at least to some extent on the quality of information given to them by the client, there is potential for counsel to make incorrect assumptions about the facts.

Further, there is potential for limited retainers to cause confusion between client and lawyer about the scope of the work do be done, and who is responsible for each discrete element of the wider legal work. Confusion as to responsibility and limits on liability could lead to dissatisfied clients, complaints and potential professional negligence claims.

The risks for lawyers include:

- Allegations of professional **negligence**, arising from insufficient knowledge of the client's factual situation.
- Allegations of professional **misconduct** in relation to client care responsibilities, duties to the court, and possible third parties.
- **Confusion**, due to failure to fully explain to the client the extent and limitations of the unbundled services being offered.
- **Unintentionally creating a full retainer**, or a retainer that has greater scope, and attracting the consequent liabilities.
- Non-compliance with **professional indemnity insurance** terms.
- **Complaints**.

It is essential that lawyers engaged under limited retainers clearly express what is covered by the contract for legal services and what is not, so there can be no ambiguity or alleged misunderstanding.

Lawyers also have an overarching duty to act in the best interests of their clients. Therefore,

a lawyer should not agree to work under a limited retainer in circumstances where, in their professional judgement, it is inappropriate.

RISK MANAGEMENT

A limited retainer is not much different from a traditional retainer in terms of the general risk management practices a lawyer should employ. However, one added risk stems from the possibility that the client may not fully understand the limits on the lawyer's responsibility under the unbundled retainer, and may not be able to competently complete their own tasks.

- **Well-documented and clear client communication is the best way to reduce risk.** Take the time to properly communicate fees and disbursements, expected outcomes, unexpected contingencies – and actively listen to and ask your client questions.
- **Be explicitly clear about who is to be responsible for what particular task and be proactive to ensure that the client is performing their tasks when there are intersecting roles.**
- **Carefully check** all communications about the retainer, especially anything you put in writing (including communication to third parties), with particular attention to the fact that you are not unintentionally extending the scope of the retainer. (See Robert Bax and Associates v Cavenham Pty Ltd [2013] 1 Qd R 476 [490];
- **Be clear with the Court and opposing counsel about the capacity in which you are acting. If you are not counsel on the record ensure this is clear on any documentation you sign.**

BEST PRACTICE

A lawyer should advise the client honestly and openly about the nature, extent and scope of the services that the lawyer can provide and whether the services can be provided within the financial means of the client. Ensure the client understands that the retainer is limited and understands the associated risks – to the client and the lawyer.

Not all clients are equal. A longstanding, sophisticated corporate client almost always presents very different considerations for unbundling than that of a first-time family law client.

Lawyers should constantly review whether a matter remains suitable for a limited retainer. For example, where there are inadequate or poor quality instructions provided by the client, further clarification from the client should be sought before continuing any assistance.

If clients give further instructions, ensure that a new letter of engagement is provided. Avoid taking on even a little bit more than outlined in your original written limited retainer without providing a new letter of engagement. "Scope creep" can lead to misunderstandings and complaints down the road.

Once a matter is concluded confirm this in writing. A completion letter serves two purposes: (1) to protect you should your client later assert that you were responsible to complete an additional step; and (2) to protect your client by reminding him or her of the responsibility to

complete the legal matter from that point or give you further instructions.

IS IT APPROPRIATE?

The ideal client for a limited retainer to work effectively is one who is:

- Self-motivated.
- Willing and able to handle paperwork, details and follow through where required.
- Able to gather and analyse information.
- A good communicator.
- Able to make decisions.
- Has sufficient time to perform the delegated tasks.
- Reasonably proficient in written and oral English.
- Not suffering from any emotional or mental health concerns.

Clients who cannot understand the limits of the representation and associated liability, or who may not be able to perform delegated tasks, may not be appropriate clients to whom to offer unbundled services.

Limiting the scope of representation does not mean that a lawyer's general fiduciary duty is lessened. Lawyers cannot contract out of fundamental ethical obligations. Lawyers must still meet a required standard of care, competency and confidentiality. And this remains the case when legal work is undertaken pro bono.

The Law Society Gazette recently reported that Lord Justice Jackson of Minkin fame has urged his colleagues on the bench to back solicitors who want to unbundle services. He said, 'If you give a solicitor a limited task to do and limited costs for doing it, you can't then blame the solicitor for not doing something else which is completely different- you can't have your cake and eat it' he said ('*We've got your back'-Jackson LJ clams unbundling fears* Law Society Gazette 16 October 2017)

WHAT RESOURCES ARE AVAILABLE?

The Canadian Bar Association and other Canadian legal professional organizations have been undertaking significant work in this area.

The British Columbia Courthouse Library has a list of useful resources about unbundled legal services at *http://www.courthouselibrary.ca/practice/familylaw/unbundling/*.

These resources include a Do's and Don'ts of Unbundled Legal Services and suggested Terms of Engagement. Any modified terms of engagement in the New Zealand context would need to be consistent with the client care information requirements of the RCCC (see: *https://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/client-care*).

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FURTHER READING

https://www.lawsociety.bc.ca/our-initiatives/legal-aid-and-access-to-justice/unbundling-legal-services/

http://albertalegalservices.com/

The New Zealand Law Society is interested in hearing from lawyers using limited retainer models about what further resources or guidance might be useful.

NZLS would like to acknowledge the Canadian Bar Association and Law Societies of Alberta and British Columbia, for its assistance in compiling this Practice Briefing.

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December 2017