

## **DRAWING CLEAR BOUNDARIES: UNBUNDLING LITIGATION WITHOUT LETTING IT ALL HANG OUT**

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**A significant proportion of middle-income Ontarians can afford to pay for some legal services. Developing innovative programs to harness this market, whether through unbundling, legal expense insurance, or other forms of subsidized legal services, would represent an important step forward.**

*Listening to Ontarians, Report of the Ontario Civil legal Needs Project, 2010, p. 56*

### **Uncharted territory, albeit well-trodden**

As of September, 2011, the Law Society's amendments to the Rules of Professional Conduct defined the manner in which lawyers could ethically provide legal services under limited scope retainers, so-called 'unbundled' legal services. Limited scope retainers are now governed by s. 2.02 (6.1), (6.2) and (6.3) of the Rules.

At the moment, Ontario lawyers appear to be slow adopters of this mode of legal service delivery, at least with that label. Fingers crossed, no one has been successfully sued or disciplined for an error or omission in an "unbundled" retainer. Look up "unbundling" in the law reports or the Law Society of Upper Canada discipline decisions and you won't find anything – yet.

One reason for the slow adoption of unbundling is that it applies naturally to litigation (family, civil and criminal). Most transactional legal services are already

delimited in scope: a will, a real estate deal, or a partnership agreement is commoditized even at the more complex levels. The client knows what he or she is getting, and no more. Litigation, on the other hand, is open-ended in terms of procedural steps and legal expenses. Ian Outerbridge, a former OBA president, told all of his new clients, “You’re hiring a camel to cross the desert. The camel might go straight through, or it might visit every sand dune.” It is for this reason that litigation has recently been the focus of efforts to solve the problem of access to justice for Canadians of modest means. Unbundling means the camel will carry the pack during some, but not all parts of the journey.

The fact that we are now considering limited scope retainers as a business model to help solve the access to justice deficit does not mean we haven’t been here before. Historically, in litigation, we know about litigants who retain and dismiss several lawyers during the life of a law suit. It is not that much different conceptually from divorce, which might be viewed as the “unbundling” of marriage into serial polygamy and polyandry. And, like divorce, serial retainers can be messy.

In a typical commercial law suit, the self-represented client may hire a lawyer to get over a summary judgment motion or a motion to strike the pleadings as disclosing no cause of action. Usually the lawyer will succeed for the client by obtaining a ruling that the case must proceed to trial. The fees on such a motion will often exceed the funds deposited as a retainer, and the lawyer will go short-changed after the client files a Notice of Intention to Act in Person.

Self-represented clients often consult lawyers to get over a difficult part of litigation, such as an important motion, an examination for discovery, or an appeal. In such circumstances, it is important to evaluate not only the clients’ needs but also their intentions. If they cannot pay for the entirety of complicated law suits, you have to have a frank discussion of what they can afford to pay for, and what they cannot. It is their problem, so don’t make it yours. Some help is better than none. Limiting the scope of a retainer to what the client can afford is preferable to a bust-up with the client after he runs out of money for full-service representation.

Unbundling is not the sole domain of middle-income citizens who cannot afford lengthy law suits. Lawyers have, for many years, unbundled litigation into tasks done by others. In Ontario, at least when the rules of assessment courts were arcane, a small handful of lawyers practised exclusively in the subject area of court costs. On the other end of the scale, many trial lawyers retained counsel as their agents to take appeals. In between, corporate-commercial lawyers would often prepare commercial litigation cases and retain counsel to appear in court, similar to the traditional solicitor-barrister relationship. When lawyers are retaining lawyers to act as agents, the scope of the retainer is more readily defined, and there is less chance of economic waste in the overlap of tasks.

In the balance of this presentation, I explain three very practical strategies for developing unbundled litigation services as a viable business model:

- Effective up-front project management as key to setting customer-service expectations
- Shifting roles from “trusted advisor and representative” to “have gown will plead” roles
- Non-delegable duties – lessons from *Fellowes McNeil v. Kansa*

**Effective up-front project management:  
The key to setting customer-service expectations**

Perhaps the most difficult subject of unbundling is the task of finding out what the client wants or needs. Take, for example, a personal injury suit in which I defended a corporate entity in a law suit brought by an elderly gentleman. At discovery, I asked why he was claiming money against my client. He answered that he was unaware that he was doing that. The plaintiff, brought to his lawyer’s office by his daughter, assumed it was all required by law if you got hurt in an accident.

This was an extreme case, but personal injury lawyers have the task of helping the client determine what and how much to ask for in a law suit. Most injury victims think of

pain and suffering but do not see the need for expensive medical and rehabilitation services. Can a personal injury lawyer unbundle litigation services? The answer is probably no, in the case of any part of the legal services requiring knowledge and expertise. These lawyers unbundle discovery tasks, such as the search for records, but clients lack the sophistication to perform most tasks, and expect everything to be done for them. Given that most personal injury litigation is taken on a contingency fee arrangement, few lawyers would consider giving up control over important stages in litigation to an untrained person. There is also no crying need for unbundling of services in personal injury litigation, because firms, not clients, tend to finance the ongoing legal fees and disbursements.

Some lawyers, such as family lawyers, delegate collection and preparation of corporate or personal financial information to clients. This can be risky, because clients are not objective or disinterested when it comes to the observance of full financial disclosure. Accountants can be helpful, but they often charge more than lawyers. You have to watch out what you instruct accountants to do, if litigating economically is the aim. Nevertheless, it is always more logical to unbundle or delegate tasks of a non-legal nature. Getting even an educated client to perform online legal research, for example, would be an act of negligence. Only you the lawyer know what key words to use, and how they lead to other key word searches. Only you know the significance of judicial language choosing to follow one line of cases over another. (For similar reasons, in my view, outsourcing of legal research to foreign lawyers is also fraught with problems. You know your court. You know how the law is interpreted here.)

The delegation of tasks between lawyer and client in the course of a law suit is almost inevitable, even in corporate retainers. The discovery process requires a search for all relevant documents. Unless the task requires it, in most instances the search portion of documentary discovery is largely delegated to clients. This is largely feasible because the discovery rules in the *Rules of Civil Procedure* place the obligation on the parties to search for and update non-privileged information. The lawyer then bears the responsibility of deciding what is relevant and must be disclosed, and what is not relevant

or must not be disclosed. This delegation of discovery tasks is not a new mode of legal service delivery.

The new mode of delivery contemplated by the term “unbundling” is intended to provide legal services to those who cannot afford full-service litigation, despite traditional methods of economizing on lawyers’ time and disbursements. For many Ontarians, they simply cannot afford all of the tasks traditionally not delegated, such as pleadings, oral discovery and hearings. Unbundling, therefore, means to chop up stages in a suit into particular events, without necessarily terminating the relationship at the end of each stage. It means clients doing things lawyers would ordinarily do, and lawyers remaining off the record.

For instance, you might draft a limited-scope retainer requiring you only to attend at the examination for discovery and the trial. If you take a trial based on pleadings and discovery already performed by the party as a self-rep, you are not responsible for the evidence, but only the presentation. In contrast, you might perform services to help a client prepare for a trial, but the client may be determined to represent himself at the trial. The client may want you to ghost-write a pleading, but he won’t pay you to research a limitation period or a statutory cause of action. (Can you really take on such an assignment? The safe answer is that you must negotiate the fee for the pleading to include any necessary research.)

Unfortunately, much of the unbundled legal service employed today is ad-hoc, dependent on clients’ cash flow. It can also depend on the desire of litigants to “have their say,” knowing they need lawyers but distrusting them at the same time. The use of counsel on a sporadic, unplanned basis can also have the effect of unduly complicating litigation where the other side does have counsel. Read the words of one Ontario Family Court judge:

Although the primary focus of the settlement conferences involved child-related issues, applicant’s counsel continually reminded the respondent and the court that the financial issues needed to be

resolved. Unfortunately as respondent's counsel was not present at these prior attendances, he had to rely on the court's endorsements and on the information conveyed to him by the respondent as to what next steps were required in this case. The respondent's sporadic use of counsel to consult with, to draft documents and sometimes to attend court is an example of the problem with the so-called "unbundling of legal services". Although this may have saved the respondent legal fees, there is no doubt that it resulted in the applicant's legal fees being increased and was frustrating to both the applicant and her counsel. It required further court time as, when the respondent's counsel did attend, many of the issues that had been previously canvassed with the respondent directly had to be reiterated for the respondent's counsel.

*Gurzi v. Elliot*, 2011 ONCJ 158

In another family case, in Superior Court, the use of "counsel for a day" resulted in a procedural mess, verging on a circus atmosphere:

[7] At the commencement of trial each party sought to have the assistance of counsel who had not previously acted for them (nor attended any pre-trial settlement conferences.) Father wished his counsel to be able to assist him during the trial on an "as required" basis, as if counsel were a consultant. Mother's new counsel had been recently retained and was not available through the balance of the trial sittings. Neither counsel was prepared to place himself on the record.

[8] After some reflection, I allowed each of the parties to have trial counsel on a "counsel-of-the-day" basis. In effect, the parties were able to retain counsel to perform designated services. The provision for such unbundled services was conditional. On the record each party would be treated as self-represented, and held to the same standards within the course of the trial, whether or not counsel assisted. I will note in hindsight that such direction was easier observed in theory than in practice.

[9] The mother had the assistance of two separate counsel through trial, the second acting as agent for the first. Her counsel of the day conducted both direct and cross examination. At no time was she in the position of having to self-represent. In contrast, the father

employed the assistance of his counsel from time to time to conduct specific tasks, such as bringing an in-trial motion for the production of the notes and records of the mother's psychiatrist.

[10] The father otherwise conducted his own testimony and personally cross examined the mother and her lay witnesses. This made for a number of very uncomfortable moments as the father was often overly-dramatic and confused in his questioning. Both parties had the assistance of counsel during closing submissions.

[11] I employed my best efforts to even-handedly deal with the many occasions in which the presence, or absence of counsel affected the course of the trial. For example, on the 9<sup>th</sup> day of trial, counsel for the father sought leave to re-open his case upon realizing that the father had missed placing into the record certain evidence the prior day, when counsel was not present.

[12] I am not satisfied that the law is clear on the ability of a litigant to re-open a case absent new evidence between the time of completing a case and a motion to re-open. However, when the evidence proposed touches on the best interests of children, it is the procedure which best protects those interests that must prevail. Each case must be decided on its own facts.

[13] Upon reviewing the facts of this case and the issues before the court, I was persuaded that it was in the children's best interests that I permit the father to re-open his case; with a corresponding right to a re-examination by the mother. I was struck by the sense that despite its history, the entire proceeding had many qualities of a hearing of first instance. I feared that should either party believe that important information had been excluded in the determination of their issues, the conflict would continue.

[14] As more fully set out below, the evidence then tendered by the father turned out to be a clear and admitted attempt to rehabilitate his case. Much of the counsel-led evidence from the father was inconsistent with previous, self-led evidence.

[15] I will offer a caution to trial counsel who accept retainers to act as "counsel of the day" advocates. It can place a lawyer in any number of difficult situations, may not allow for adequate preparation and detracts from a consistent presentation of a case. Nonetheless, I wish to sincerely thank all three counsel – inclusive of mother's second counsel – who assisted with this case. Their skill in organizing and presenting their respective client's evidence, within the limitations of their respective retainers was most helpful.

*Antemia v. Divito*, 2010 ONSC 578

We read from this that trial judges have been willing to allow lawyers to act without assuming all of the obligations of a lawyer of record. At this time, the writer's understanding is that the Civil Rules Committee is considering changes to the Ontario *Rules of Civil Procedure* and *Family Court Rules*, to accommodate limited scope litigation retainers more formally.

In this type of “scrambled eggs” litigation, unbundling does not necessarily provide the best service in the circumstances. In order to avoid the pitfalls, the lawyer must assume a pedagogical role in teaching the client about the steps in which the client will be unrepresented. Instead of being a hired gun for a day, unbundling in a careful and purposeful way involves an on-going retainer which allocates tasks between lawyer and client.

The organizational role of the lawyer as teacher and project manager, from the outset, involves guiding the client and providing a rough guide to the client's expectations along the way. Management of the unbundled retainer is therefore a value-added service of consulting with a lawyer. You can either charge for it, or factor in your time for the consultation in the cost of each separate package of services. The important point is that the client receive your advice and organizational service at the outset, and then continue to exchange a flow of information during the course of the litigation. This will avoid the spectacle of counsel appearing at key moments unprepared.

**Shifting roles from “trusted advisor and representative”  
to “have gown will plead” roles**

Perhaps the most difficult conundrum, from a lawyer's perspective, is to remain detached emotionally and professionally from the process and the outcome. You may feel a case or a defence lacks merit, but in a limited scope retainer an assessment of the merits may not be part of what the client wants. *Access to justice* is not to be confused



with *success* in justice. Rule 4.01(2)(a) of the *Rules of Professional Conduct* prohibit lawyers' participation in malicious suits, but parties and lawyers bring meritless actions all the time. Provided the client does not bring an action for the wrong reasons, you can help a client achieve access to justice even where you may believe the client's cause to be doomed to failure. If you can't get your mind around this thought, then most likely unbundling is not for you.

As in any market equation, supply must meet demand or else one side or both will not get value from the transaction. From the client's perspective, "à la carte" might be a better way of describing the process. "Unbundling" is a word coined by lawyers, because we think of the process through the eyes of professional responsibility. How one matches these two very different perspectives will have a considerable influence on the success of the limited-scope retainer.

### **Non-delegable duties – lessons from *Fellowes McNeil v. Kansa***

Subsection 22(1) of the Ontario *Solicitors Act* codifies for lawyers the traditional common law principle voiding all agreements with professionals and purporting to limit the availability of professional malpractice suits against the professional:

**Agreements relieving solicitor from liability for negligence void**

**22. (1)** A provision in any such agreement that the solicitor is not to be liable for negligence or that he or she is to be relieved from any responsibility to which he or she would otherwise be subject as such solicitor is wholly void. R.S.O. 1990, c. S.15, s. 22.

This provision governs all lawyers in Ontario. The *Law Society Act* R.S.O. 1990, c. L.8, s. 29, makes no distinction between barristers and solicitors. This is a historical phenomenon arising from the lack of lawyers in Upper Canada during colonial times. Prior to Confederation, Ontario did not have enough lawyers to enable them to separate into two disciplines. The significance of this historical duality of the legal profession is that those seeking to maintain a strict barrister practice must take steps to define the scope of the retainer, or face liability as both a solicitor and a barrister.

There does remain, nevertheless, a legal distinction between barrister and solicitor roles and responsibilities in the course of litigation. In *Wong v. Thomson Rogers* 1994 CanLII 841, the Court of Appeal for Ontario recognized for the first time in Canada, at the appellate level, the barrister negligence test articulated in the lower court decision in *Demarco v. Ungaro* (1979), 21 O.R. (2d) 673. That test required a plaintiff in a lawyers' negligence suit against a lawyer for decisions made in the course of a court appearance, to show more than an error in judgment or a bad decision. The error or decision has to be egregious in order to constitute negligence or malpractice.

The policy reason for this high threshold is the courts' recognition that barristers exercise value judgments entering and during the course of trials or other hearings which cannot wait for further research, investigation or other due diligence. (Indeed, as counsel for the defendant (appellant) in *Wong*, I certainly made such a judgment call in advising my client to fight the appeal despite the lack of a Canadian appellate precedent.) This test falls short of the historical barrister immunity, but it affords a considerable degree of protection compared to the standard of care for solicitor's work. Because lawyers in Ontario wear both hats, the high threshold applicable to barristers may not protect the lawyer for an error or omission made in the same law suit which may be characterized as solicitor's work. The failure to plead an applicable defence, or to issue a statement of claim on time, for example, will be held up to an ordinary solicitor's standard of reasonable competence.

In the context of unbundling, where all the client believes he or she requires is a barrister to appear in court based on a brief prepared by the client or by another solicitor, it is important to spell out the scope of the retainer in writing. The *Solicitors Act* prohibition against contracting out of negligence does not prohibit the limitation of the scope of the retainer. Observance of the scope becomes a matter of slavish attention to boundaries, and to keep both the other parties and the court apprised of these boundaries. You do not, for example, want to be confronted by a direction from the bench to undertake to do things beyond the scope of your brief. The judge will, reminded of your limited retainer, be obliged to require such undertaking from your client instead.

If, on the eve of or during the course of a hearing or trial, you notice the lack of a document or a pleading error, the temptation would be to correct the situation and draft one yourself. Do this and you risk accepting responsibility for reviewing the file beyond the prepared brief and taking over full responsibility. The operative principle is similar to the Good Samaritan law (no duty to rescue, but negligence law applies if you undertake a rescue) or to the law of tort applicable to government (no duty to build a road, but once it is built, it must be safe). If the limitation of the scope of retainer satisfies the Law Society's rules, you have to stay inside the boundary of that circle or risk losing the protection offered by the limitation.

The Law Society has created some room for lawyers to engage in this practice, so they do not risk disciplinary action for failing to provide services for all aspects of a legal matter. What has not occurred, however, is statutory relief against negligence claims arising from limited scope retainers. Indeed, how would a limited scope retainer agreement be interpreted along side s. 22 of the *Solicitors Act*, which provides that any agreement to contract out of professional negligence is void? (The provision does contain an exception for employment agreements.) The lack of statutory relief against negligence claims has been cited as a reason for defensive legal practice, in turn causing the cost of legal services to rise beyond the reach of many Canadians. (See MacLeod, Is 'Defensive Practice' by Lawyers an Obstacle for Access to the Courts? *B.C. Justice Review Task Force and the Civil Justice Reform Working Group*, June, 2005.)

The law of professional negligence requires lawyers to advise clients on matters outside of the scope of a retainer, if important information comes into his or her possession. The fact that the client has hired a lawyer on a limited-scope retainer does not relieve the solicitor of acting reasonably in respect to the ultimate loyalty owed to the client: *Fellowes, McNeil v. Kansa* (2000), 22 C.C.L.I. (3d) 1 (leave to SCC allowed, but settled before hearing). In *Fellowes*, a solicitor's excess E&O insurance carrier hired McNeil to protect its interests in a negligence action against its insured. The excess carrier was not aware of any misrepresentation by the insured at the time he was sued.

The carrier did not specifically instruct McNeil to advise it concerning the issue of coverage. Thus, McNeil's defined role at the time was not quite defence counsel, because the carrier's insured was provided a defence by the primary insurer. Nor was he coverage counsel for the excess carrier, because his role was to protect the excess carrier's exposure to a judgment against the insured in excess of primary insurance limits. This, or so McNeil thought, was a well-defined role.

In *Fellowes*, at paragraph 53, the Court of Appeal for Ontario upheld the trial judge's finding that an insurance coverage opinion was included in the scope of the retainer on behalf of an excess liability insurer in a civil action: "Kansa's interests at this time included not just the question of liability but coverage as well." However, the Court of Appeal also considered the solicitor's duty of care even if one assumed the retainer did *not* extend to insurance coverage. The question the Court then posed was whether "an ordinarily competent and prudent solicitor" would have realized that the insurer client's coverage interests could be affected by important new information received during the course of litigation. At paragraphs 54-59, the Court upheld the trial judge's ruling that the solicitor may not have been required to seek out the coverage information, but was required to understand the significance of the information once he was aware of it. He was then required to alert the insurer of it and of its significance.

We learn from *Fellowes* that strict compartmentalization of lawyers' obligations is more easily said than done. If you, as a lawyer retained for a limited scope of services, stumble upon information which has significance outside the scope of your retainer, you are obliged to alert your client about it. The client can then decide to take appropriate action, or not to take action, after receiving your advice. If the advice is to do something, and your client wants you to do it, the client can then amend the scope of your retainer; i.e. redraw the boundaries.

The courts resist denuding lawyers of their professional obligations and the resultant commoditization of legal services. This tendency must be seen from the past legal practice experience of the sitting judiciary. As with many legal developments, it

may take a generational change in the composition of the bench before counsel can appear as “counsel for the day” without fearing a bench-imposed extension of a limited-scope retainer.

Because of the knowledge imbalance, the boundaries for a limited scope retainer can be interpreted narrowly against you and expansively in favour of your client. This means that you may be expected to do more than you bargained for, and get paid more or less what you bargained for. It is the lawyer’s onus to ensure the client knows precisely what he is getting and what he is not getting. Otherwise, the lawyer risks being burdened with the responsibilities of a full-service retainer if things go wrong in the law suit. If your client wants you to work on it, then there must be an *ad hoc* amendment to the retainer. Simply doing the work without redrawing the boundaries will expose your firm to more E&O liabilities without exposing your law firm to more remuneration.