

JUST AN HOUR OF YOUR TIME?

Dr Bridgette Toy-Cronin, 24 March 2016

“Unbundling” legal assistance has been promoted in other jurisdictions as a key tool in providing access to justice.

In New Zealand, the term “unbundling” is closely associated with the restructure of the telecommunications industry, rather than a means of offering legal services. What it means is providing limited assistance to a litigant, on a discrete aspect of their case, with the expectation they will otherwise be litigating in person.

The “father of unbundling”, Forrest Mosten, began promoting the idea in the 1990s in the United States. Rather than having full carriage of a legal matter, he advocated for lawyers providing representation for certain aspects of the case: a negotiation, drafting a pleading (ghost writing), legal research, or appearing in court.

The benefit of unbundling being emphasised internationally is that people who can afford some legal services, but who cannot afford to pay for a lawyer to take full carriage of the matter, can access some legal assistance. This assistance may benefit not only the litigant in person (LiP), but also be of wider benefit, alleviating the burden LiPs are commonly thought to place on the courts and opposing parties.

For lawyers, discrete task assistance is a potential avenue for revenue growth, tapping into a market of people who can afford some legal assistance but who are currently either going to court in person or not going to court at all.

In this article I discuss the current landscape for unbundled assistance in New Zealand, drawing on the substantial international literature and also data from a study I conducted on LiPs in the New Zealand civil courts (Bridgette Toy-Cronin *Keeping Up Appearances: Accessing New Zealand’s Civil Courts as a Litigant in Person*). In that study I interviewed, and sometimes also observed and reviewed the court documents and correspondence, of 34 LiPs litigating in the Family, District and High Courts. I also interviewed court staff (8),

lawyers (16) and judges (13) working in those courts. I then consider what changes might be needed to make discrete task assistance more common.

ACCESS TO UNBUNDLED ASSISTANCE IN NZ

Unbundling is beginning to gain some momentum here. It was discussed as part of the answer to the access to justice problem in LawTalk's feature last year (James Greenland "Mind the Gap: Closing the Justice Gap" LawTalk 878, 19 November 2015).

The New Zealand Law Society recently published its own guidelines, which may provide some comfort to lawyers thinking of offering this service and help guide thinking about whether a particular case or client is suitable for this type of assistance: New Zealand Law Society Practice Briefing: Guidance to Lawyers Considering Acting Under a Limited Retainer(3 February 2016) www.lawsociety.org.nz.

While some forms of unbundled assistance have long been part of the New Zealand legal landscape (eg, Community Law Centre advice and barristers performing limited retainers for solicitors), widespread unbundling remains uncommon. This is despite the New Zealand Law Commission recommending investigation of the provision of unbundled legal assistance in response to the perceived increase in LiPs, as long ago as 2003 (*Dispute Resolution in the Family Court* (NZLC R82, 2006) at 195).

Most unbundled services that LiPs in my study accessed were offered on an ad hoc basis, from lawyers who normally offered full retainer services. A number of Family Court LiPs referred to seeking one hour sessions with family lawyers to obtain guidance and reassurance regarding their management of their case. Some of the LiPs who had one-hour advice sessions reported that they were not charged. Lawyers said that it often was not worth opening a file and going through the process of sending a letter of engagement so they ended up "doing a bit of a freebie".

Lawyers also gave free advice to LiPs who were former clients or who they knew socially. Free, informal, unbundled assistance was much more common than LiPs being offered

assistance via a more formal pro bono scheme being operated by an individual lawyer or law firm scheme.

For more substantial unbundled assistance, such as drafting or opinion work, many LiPs had enough money to pay for the service and some found lawyers who would do this work. One who did not have enough money to instruct a lawyer used crowdfunding to pay for some discrete task assistance.

A small number of lawyers do market themselves as offering unbundled services, particularly in family law. This may become, or may have already have become, more common given the family law reforms introduced in March 2014 prohibiting representation by a lawyer in some Care of Children cases.

There are also some online services offering unbundled assistance. For example, www.lawonline.co.nz is a document drafting and advice service run by a single registered New Zealand lawyer, and JustAnswer, a US-based service offering New Zealand legal advice. LiPs in the study had used both these services. There is also a free legal question and answer service, www.lawspot.org.nz.

LAWYERS AND JUDGES ON UNBUNDLED ASSISTANCE

Many of the lawyers interviewed said they sometimes offered discrete task assistance, but were very wary of doing so, and selective about who they offered the service to.

A lawyer who was offering limited retainer services to a large number of clients saw lawyers' reluctance to offer such a service as the result of "a huge tradition that the lawyer does it all and charges like a wounded bull for it and controls everything". Other lawyers offered a number of reasons why they were uncomfortable with it. These reasons included:

- It has low monetary rewards and high costs – lawyers paid for an "hour of your time" spent additional time recording the advice (to protect against future claims of incorrect advice) and time recording the retainer;

- Difficulty accurately recording the limits of the retainer and having to be mindful of updating the retainer when the client returned for further assistance;
- Clients did not understand the complexity of their case and so expected an hour of advice or other discrete task assistance to be sufficient but often it was not. Lawyers said they were sometimes asked for “just an hour of your time”, but the client would then attend the meeting with lengthy documents and the instruction: “Don’t incur too much time, but here is this 20 page document, what do you think about it?” As a senior civil litigator explained, “It is not like fixing a car or unblocking the drain. It is likely to be complex and intensely felt”;
- The quality of assistance was compromised by the restrictions on the time to complete the work;
- That the client may not understand the advice and therefore it would be of little benefit; and
- The factual basis on which the advice had been given might change, leading to an increased risk of being accused of having given incorrect advice. This happened to one lawyer who had given advice to a client who was appearing in person in a tribunal. The tribunal decision was published, naming the lawyer and saying that the lawyer had “misadvised” the party. The lawyer said he had not given the advice at all and recalled the judgment and had it corrected because he was worried about the reputational harm of having it stand.

These concerns led many of the lawyers interviewed to view limited retainer assistance as “perilous and unsatisfying” (civil litigation lawyer), and they were therefore unwilling to undertake it, except where there was an existing relationship with the client.

There was evidence to suggest that lawyers were right to be concerned that LiPs receiving limited retainer assistance may not comprehend the advice, or its limitations. A number of LiPs did not understand that a lawyer was giving an “opinion” rather than “the answer”.

When the judge or opposing counsel challenged the advice by raising a contrary argument, the LiP was quick to conclude that the lawyer who had given them the advice was “wrong”. These LiPs did not raise other possibilities including: that the opinion had been a legal

argument only, open to challenge by other argument; that the LiP may have misinterpreted the advice; or, that the nature of the case had changed since the opinion was given.

Judges had no objection in principle to lawyers ghost writing documents or providing “behind the scenes” assistance. They did note that sometimes LiPs would quote advice they said they had received and name the lawyer but the Judges “shut that down pretty quickly” (High Court Judge). When asked directly about whether they thought unbundled assistance was objectionable, none of the judges interviewed raised any concerns about it.

IS UNBUNDLED ASSISTANCE USEFUL?

We do not have robust evidence, either here or internationally, about whether unbundled assistance is beneficial. There is a widespread belief that some assistance is better than none for LiPs, but there is not currently the evidence available to support this conclusion. It is possible that a little advice is dangerous, increasing a litigant’s confidence but not their ability to manage their case.

While we do not have the benefit of gold-standard evidence (either here or internationally) about whether unbundled assistance is preferable to no assistance, the conclusion I drew from my study data was that individualised assistance is preferable to LiPs having access only to generic information online or in brochures.

Some LiPs wasted their own time, and that of the court and the opposing party, because they were seriously mistaken in their interpretation of the law and its relevance to their case. For example, a well-intentioned family law litigant was confused by a judge’s reference to privilege attaching to a document tendered as evidence. In response, the litigant spent many hours researching and trying to argue the defamation defence of “qualified privilege”. Some unbundled assistance for that litigant would have saved everyone time.

Discrete task assistance is not, of course, suitable for all litigants or all cases. Mosten himself suggested many limitations about when unbundling might be suitable. Those who are vulnerable or those who find it difficult to speak publicly or write and organise

documents and take proactive steps (which can be for a variety of reasons), may not be suitable clients for this type of assistance.

There are other LiPs who have limited funds and the ability to carry out some steps independently, who would probably benefit from unbundled assistance. Many of the LiPs in my study had funds to be spend on their case but had exhausted them early in the proceeding on negotiating with the other party or preparing for court, but they had no money remaining to bring their case to a conclusion. Marshalling the resources they did have more strategically, by using discrete task assistance at important moments in their case, may have had considerable benefits for them, the opposing party and the court. The LiP would have access to legal assistance even though they cannot afford full representation, and engagement of a lawyer at strategic points might assist in the “just, speedy and efficient” disposition of cases, a benefit to both litigants and the court. This would require lawyers making a strategic plan with a litigant at the beginning of the case, identifying the amount in the litigant’s “war chest” and then discussing how this can be used to greatest effect.

WHERE TO FROM HERE?

Given that some lawyers are already offering unbundled assistance and that there is a need to find ways to allievate the problems people face accessing legal services, I suggest it is time to look at barriers that are preventing the growth of discrete task assistance. These barriers include lawyers’ concerns about whether it is legal and ethical to offer unbundled assistance and procedural rules regarding solicitors on the record.

First, a review of the procedural rules regarding entry and withdrawal as solicitor on the record would be necessary to encourage discrete task assistance, particularly unbundled representation.

New Zealand’s procedural rules are brief and only discuss entry on the record (HCR 5.38) and the circumstances where withdrawal is permitted (HCR 5.41).

In the United Kingdom, the civil procedure rules are more detailed and specifically exempt the lawyer from having to go on the record if they are “appointed only to act as an advocate for a hearing”: Civil Procedure Rules 42.2(1)(b) (United Kingdom).

New Zealand has no similar rules that make it plain that discrete representation services can be undertaken without being on the record. Like the New Zealand Law Society, the Law Society of England and Wales has published guidelines on unbundling. Their guidelines are detailed and include an appended specimen letter, which can be handed to the judge to explain the limits of the lawyer’s responsibility for the matter. Developing a similar letter for the New Zealand context would be helpful.

For this form of assistance to become more common, the co-operation and support of the judiciary would be required, both for rule changes and to provide comfort to lawyers that judges will not imply a full retainer when a limited retainer was intended.

The recent United Kingdom case of *Minkin v Lesley Landsberg* [2015] EWCA Civ 1152 will be helpful in this regard. It involved a claim of professional negligence against a solicitor and considered whether the solicitor’s duty was limited to what the solicitor said was a strictly limited retainer. The trial judge and appeal court both found the solicitor’s duty was limited to the terms of the retainer and no broader duty beyond that retainer was owed. In a concurring judgment, Lady Justice King observed that the client care letters and retainer “must be drafted with considerable care in order to reflect the client’s specific instructions”.

The New Zealand Law Society could consider developing specimen letters of retainer for common forms of unbundled assistance, lowering the cost for drafting the retainer and providing comfort that the letter is drafted with sufficient clarity.

Another issue to consider is billing for unbundled services. One of the barriers to offering unbundled assistance is the difficulty in giving accurate fees estimates for a step in a proceeding. Exploration of alternatives to hourly billing and the regulatory context for alternatives also need to be explored when considering reforms to encourage discrete task assistance. This work has been begun by the Access to Justice Working Group of the New

Zealand Bar Association. It is considering a number of areas for reform to increase access to justice and is beginning dialogues with other interested parties to explore implementation.

CONCLUSION

Unbundled assistance is not a silver bullet for the problems of access to justice. Those problems are complex and no single solution is available. Helping litigants with discrete tasks in their litigation, for some clients and in some cases, may assist those litigants in accessing the court more effectively. It may also alleviate some of the burden the court and opposing party feels when faced with an LiP. For lawyers it may provide a new source of income, a currently under serviced area of the population. In the right case, unbundling may prove a win for everyone involved in the litigation and the time is right for exploring this option further.

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