April 2013 saw the advent of the deepest cuts to legal aid since the scheme began in the 1940s. The impact of these cuts on your business will depend on how reliant your clients were on legal aid and how you intend to remodel your future legal services offering. This month we look at some of the issues to be considered carefully before taking on this new challenge.

Welcome

Andrew Nickels

The legal aid cuts will inevitably have an impact on the availability of legal services for those on lower incomes. There may be more pressure on the court system, if the already increasing number of litigants in person continues to rise. Mediation and alternatives to litigation are becoming increasingly attractive – the Government has announced an additional £10million funding for mediation – which may be useful. Firms also need to look at how services are currently/could be delivered.

What is clear is that clients need a means of obtaining knowledgeable, affordable legal advice. Fixed fee packages, or unbundled legal services, may provide the solution for some firms, provided there is an awareness and understanding of the risks associated with the provision of services by these means and the need to ensure that appropriate processes are in place to address those risks. No firm wants to give fixed fee advice for, say, £100, and then find itself the subject of a negligence claim for thousands of pounds because the fee-earner lacked sufficient expertise to advise fully and accurately, or because the work was not supervised appropriately. There is a real fear that commoditisation of legal services will lead to the “dumbing down” of work that requires significant skill, as well as appropriate management, resourcing and costing. Is a low quality, cheap service an appropriate response to those who are now denied legal aid?

Unbundled services

This is the provision of discrete events of legal assistance under a partial retainer; as opposed to a traditional retainer where a solicitor typically deals with all aspects from initial instructions to conclusion of the matter. The risks inherent in this way of working are significant – the Law Society is so concerned that it issued a practice note on 1 May 2013 (www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services).

The essence of unbundling is that the client leads the case, so the solicitor does not accept service of documents, does not send out correspondence in the firm’s name or otherwise communicate with third parties, does not incur disbursements and does not go on the court record. There are some limited retainer models that are close to a traditional retainer in terms of the service offered to the client, but only for clearly defined elements of the case – the greater the solicitor’s involvement, the greater the risk that a full retainer could be implied.

Fixed fees

Some law firms are already offering fixed price packages, for example, for family services such as assisting with the making of the initial court application; further packages are then available to provide ongoing advice where required – pay as you go, a convenient means of allowing clients to keep control of their legal expenses.

Fixed fees are not a new concept; lawyers have been using them for years. It is very important, however, to specify precisely what is included in the fixed fee – and more importantly, what isn’t. It is essential to learn from the experience of fixed fees in other fields. Many conveyancing firms have been inundated with claims arising from the lack of knowledge and appropriate skills of those doing the work. A lower fee shouldn’t mean that a lesser-qualified person does the work – a lower service provision cost, perhaps, but it inevitably leads to more claims and is more expensive in the long run. Your fixed fee must be realistic, one you can stick to – price wars serve no one and negligence claims, or worse, will follow if corners are cut.

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The Risks
If your firm is providing fixed price packages, unbundled services or any other innovative means of providing affordable advice, or is considering it, you will need to consider the risks involved as well as the potential profits.

Some of the issues associated with both fixed fees and unbundling include:

1 The Service
You must be clear what service you are providing – is it fixed fee (total service for a set price – full retainer) or, unbundled (partial retainer usually, but not necessarily, for a fixed fee)? Some firms are providing advice in some areas of law for £10 per 6 minutes to clients who “pop in” off the street. You may have decided to provide this service as a loss leader, in the full knowledge that it will cost you more to provide than is recovered in fees. We are extremely wary of this type of service – the cost of keeping appropriate records (see below) far outweighs the fees, and in our view, this is particularly high risk activity.

2 The Client
- You must follow the usual client ID, conflict checking and anti-money laundering procedures; in that regard, a personal meeting with the client will be needed. Whilst this will assist with establishing the client’s identity, it will also provide an opportunity for you to assess the client’s ability to understand and to act on your advice.
- You have an overriding duty to act in the client’s best interests – unbundling may not always be appropriate, (such as in cases of great complexity or where you have concerns about clients’ abilities to understand your advice and/or carry out tasks themselves), and you must consider whether it is in your particular client’s interests to offer an unbundled service. It may be appropriate to decline to provide the service.
- Client care obligations set out in the SRA Handbook, and in particular Principle 4 which requires you to act in the best interests of your client, and Principle 5, which requires you to provide a proper standard of service to your clients, apply equally to the provision of unbundled services as to a full retainer.

3 The retainer
- Clearly express what is and what isn’t covered by the retainer, to avoid any ambiguity or misunderstanding. Clients must be aware of what they will have to do for themselves. This should be stated in writing as well as verbally.
- It is all too easy to go beyond the limits of your retainer. By doing so you run the risk, unwittingly, of implying a full retainer is in effect. You should list the things a solicitor might traditionally be expected to do on a full retainer but which are not included in the unbundled service agreement. For example, specify if the agreement does not include negotiations with a third party. Clarity in what you will, and won’t do, for the fixed fee is paramount. It will be no defence to a regulatory investigation or a claim for negligence that the client only paid a fixed fee. As stated, the correlation between fixed fees in the residential conveyancing context, (and the attendant price war) and the high level of subsequent conveyancing claims provides ample evidence of the dangers involved, and particularly when those providing the advice are unqualified and lack the appropriate expertise.
- Ensure the client is fully aware of your fee structure and of other costs that they may incur in pursuing their action. Similarly, make it clear when you will require payment of your fees. We are aware that many firms insist on payment either at the outset of, or, at the conclusion of the interview. This can be compelling evidence of a discrete advice event.
- Supplying unbundled services places an even greater responsibility on you to set out what you will do for the client and what the client must do themselves.
If you are providing an unbundled service, each step of the process must be an isolated piece of discrete advice and a separate retainer will be required at each step. For example, if a client seeks advice initially to submit a request for a Statutory Assessment (of Special Educational Needs), the retainer ends when that advice is given. If they then, return for advice, say, in responding to the Proposed Statement, a separate retainer is required. It should be clear at each stage when the retainer begins and ends.

- When providing advocacy as part of a fixed fee and/or unbundled service, you need to take account of the unpredictable nature of attending court – in particular, waiting and travelling time. Clients need to be aware of matters such as:
  - mileage and other travelling charges
  - how waiting and travelling time will be charged
  - what is included in the fixed fee – such as 30 minutes in conference before the hearing, preparing for the hearing, the hearing itself (fees will differ depending on how long the hearing is listed for), agreeing any orders at court, a 15 minute de-brief after the hearing.
  - what isn’t included in the fixed fee – such as which courts aren’t included, appeals, part-heard hearings, preparation/consideration of paperwork, briefing a barrister.
  - how matters not included in the fixed fee will be charged.

4 Advising the Client

- It is essential to obtain adequate information to enable you to advise the client properly. Avoid any temptation to make assumptions about the facts – always clarify the information with the client and, if the client is unable to provide sufficient information, you should not advise.
- Each time a client seeks advice, you must treat that client as if he or she was a new client. Don’t make assumptions based on the information given at the previous meeting.
- Even if you are providing an unbundled service, your duty of care obligations dictate that you should advise clients of all relevant matters that they would need to be aware of if they were being advised on a traditional full retainer. For example, in the context of matrimonial property proceedings, when parties to the divorce agree the financial split of assets between themselves, the need for formal valuations of assets, and in particular of pensions, is often forgotten about or deliberately ignored, or one party accepts the other’s estimated value without question. You may be at risk if you have failed to recommend that such valuations be obtained.
- If your client is considering making a claim for costs against his or her opponent, you should advise that the opponent should, as soon as is reasonably practicable, be informed that the cost of legal advice on a discrete issue has been incurred and, may be sought to be recovered from that opponent as a cost.
- You should be mindful of key dates such as expiry of limitation periods, appeal deadlines and compliance with court directions. Ensure you have advised the client of any relevant dates, of the potential risks of not complying with them and that you will not be reminding them of these dates.
- You must inform clients of your complaints procedure and their right to complain to the Legal Ombudsman.

5 Records

- You should keep a written record of the information you have received from your client, what he or she wants to achieve and the advice you have provided. You should retain one copy and give one to your client. Advice should include a disclaimer stating that the advice is based on the client’s own information and that you cannot be held responsible for incorrect advice if the client has not provided all the relevant information. If the information provided is insufficient, or you feel that it is incorrect, you must make this clear to the client, and depending upon the circumstances, either qualify your advice accordingly or do not advise until the necessary information is provided.
- When providing unbundled services, you should not generally retain your client’s documents save for copies of documents you have assisted the client to draft or complete. However, you should always retain a copy of any document that evidences your client’s instructions to you.
- Think carefully about the time that will be needed to maintain a full and accurate record of information received and advice given – it may cost more in fee-earning time than you charge the client!
Fee earners

- Solicitors have a duty to apply the relevant degree of skill and exercise reasonable care. To that end, it is critical that only those fee-earners with the relevant professional expertise are engaged to provide the service. Ensure all fee-earning staff are fully aware of the consequences of exceeding the agreed limits on the relevant retainer. The retainer is critical in determining the extent of the duty of care, but there is a risk that the scope of the duty may be found to have been more widely drawn, in determining professional negligence, if fee earners act outside the scope of the retainer.

- Ensure uniformity amongst fee-earners in the way advice is given to clients. You will need to have in-depth discussions with all those involved in the work (divorce, dispute resolution, debt-collection, education, disability, etc) to decide how best to provide the service. The use of standard explanatory notes outlining both the process as a whole (e.g. of litigation, divorce, matrimonial property proceedings, as appropriate) and the specifics of each discrete stage can help to provide the appropriate context in which the particular advice event takes place.

- Reinventing the wheel by every fee-earner every time won’t help profitability; uniformity and consistency in explaining the basics can help to reduce the risk of any misunderstandings on the part of clients.

- Ensure fee earners exercise strict self-discipline in keeping within the terms of what the firm has agreed with the client to undertake. For example, if a third party requests information, under no circumstances should the firm supply that information, irrespective of how straightforward it would be to do so, unless it has been specifically agreed in the firm’s retainer that you will do so. You must refer the third party back to the client.

- You must comply with your duties to the court – if you have concerns that your client may be seeking or is intending, to mislead the court, you must advise him or her not to do so. You should also consider your professional obligations with a view to ceasing to assist further if the client refuses.

How your firm chooses to move forward in the changing legal landscape is entirely your decision. We acknowledge that firms need to find a different way of working, particularly in those areas affected by the legal aid cuts – a way to provide the service economically for those clients who do not have the means to appoint a solicitor on a traditional retainer. To do so through the provision of fixed fee and unbundled services, without opening the floodgates to negligence claims and regulatory/professional conduct investigations, will require robust risk management. We are not blind to the reality of this situation – are you?

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