**Focus** CIVIL LITIGATION

# New practice style could increase access to justice

Limited scope retainers, fixed fee options needed to stem tide of self represented litigants

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Increasing numbers of civil litigants are self-represented, especially in family cases. Many people start out with a lawyer, but faced with insurmountable costs, people of modest means are increasingly choosing to represent themselves. Yet somehow, for lawyers, the legal pie is shrinking. Increasing numbers of lawyers are underemployed.

The average person does not qualify for legal aid but cannot afford a lawyer. For these people there is no real access to lawyers, to the legal system, to justice.

Ontario Superior Court Justice David Brown remarked to the Carleton County Law Association in 2014, "Our court needs to assure the public that if they seek our assistance to deal with a civil dispute, the process will be completed within a reasonable period of time and at a reasonable cost. If we cannot provide such an assurance, we risk losing our legitimacy as an effective part of our democratic governance system."

While more people represent themselves in court, the affluent are opting out of the public system by purchasing expensive private arbitration or mediation. This has negative implications for the development of the jurisprudence because privately arbitrated cases are being decided without the benefit of a public hearing and the judicial reasons that would otherwise follow.

For the cases that remain in the public system, the challenges are greater for the ordinary citizen than for the wealthy, creating a two-tier system. Only high-value civil matters such as those on the Commercial List are generally case-managed and triaged. This is a highly effective method of streamlining cases to make them more efficient and affordable. Case-management and triage has been partially expanded to civil motions in Toronto through the use of the Civil Practice Court. For the most part, ordinary citizens with low-value matters have limited access to this process. Chambers appointments, which are very effective in resolving procedural issues without the necessity of a formal motion, are unlikely to occur where one or both of the parties is self-represented. Paradoxically, it is those without legal training or resources that are ineligible for this less formal and less expensive process that is so effective in facilitating the progress of an action.

The problems of self-representation extend beyond the litigants themselves.

Self-represented litigants often do not know what to tell a judge, and file large volumes of irrelevant material. This consumes valuable judicial time and court resources, overburdening judges who are left to do the sifting that would normally be done by a party's lawyer, and to do their own legal research.

Today's DIY litigators have an easier time accessing online court forms, guides on self-representation and legal databases. While helpful, these tools are an inadequate replacement for a law degree and years of experience. Self-representation may prove to be a false economy. With only Google by their side, these litigants often struggle to appreciate not only fundamental concepts but also the legal nuances and distinguishing factual and legal features of their cases.

Self-representation results in inefficiencies and creates costs and delays for the other party as well. Self-represented parties are often unable to properly assess the strengths and weaknesses of their positions, have unreasonable expectations and may be unaware of the penalties for taking untenable positions. This makes settlement negotiations unproductive.

Self-representation has negative implications for the evolution of the jurisprudence. Cases of public interest launched by self-represented litigants may be decided without the benefit of well-developed legal argument. Arguable cases will not be identified and taken to an appellate level for the guidance and benefit of everyone in the country.

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This situation has occurred despite numerous studies, reports and consultations which have resulted in changes to the judicial process. Further-simplified language and procedure may bring about a more efficient result but not necessarily a just result.

For the sake of all of the constituents — clients, lawyers, the courts and the administration of justice — lawyers need to adapt. All-or-nothing retainers are a deterrent to ordinary people seeking the assistance of a lawyer. The limited scope retainer is a flexible service option that can make legal services accessible again. Value-based billings and block fees rather than time-based billings will bring more certainty and affordability and will appeal to clients who might otherwise have foregone some form of legal assistance.

For lawyers, the offering of unbundled legal services and limited scope retainers will require careful attention to professional liability hazards.

Communications issues and unintentional expansion of retainers are big concerns. Accepting retainers for discrete tasks will require lawyers to be extra-attentive to the clarity of their retainer agreements and communications with clients. A standardized retainer agreement with clear and simple language setting out the scope of work is essential. Clarity as to when the retainer ends is essential as well.

Unbundled legal services or limited scope retainers also present an information-collection hazard for lawyers. As legal advice must be tailored to the client's circumstances, lawyers must exercise care in their investigation and documentation of facts. It must be clear what is the lawyer's responsibility and what is the client's responsibility. Information-collection must be streamlined in order for the lawyer to provide a reasonably accurate fee quotation and make a decent living while delivering an acceptable standard of professional service.

The availability of unbundled legal services and fixed fee options needs to be made more widely available by lawyers and more well-known to clients. These models should be seen by lawyers as an opportunity to serve a niche market and worthy of the investment in knowledge, training, systems, staff, equipment and promotion for a new style of practice.

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