By Susan Humiston

Ethically unbundling legal services

In light of the MSBA's Pro Bono Week this month, it's a good time to revisit a legal services model that helps expand litigants' access to justice: "unbundled" representation. As access-to-justice professionals have noted for some time, it's not just the very poor who cannot afford legal fees; most people have sticker shock when they price lawyers for important personal matters. This article will discuss ethical considerations related to unbundled or limited scope representation, whether on a pro bono basis or for a fee.

The term "unbundling" seems to me a very lawyer-like way of saying limited representation. Instead of providing full representation—a "bundled" set of services—lawyers provide services *a la carte*: reviewing a proposed settlement agreement, for example, or offering advice-only consultations or assistance in drafting pleadings.[1] Many lawyers do this naturally, and may not realize there are ethical limits to structuring a representation in this manner. Conversely, there are probably lawyers who are intrigued by this idea but worried that they will not be able to withdraw, do not know how to ethically structure a limited representation, or may be setting themselves up for a malpractice claim.

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Ethics rules implicated

In 2005, Minnesota adopted revisions to Rule 1.2 to facilitate limited scope representations. Rule 1.2(c) provides "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[2] Not all cases are good candidates for limited representation. Minnesota bankruptcy courts prohibit it.[3] Complex litigation or particularly contentious family law matters may make it impractical. Court rules may prevent it in some circumstances, such as criminal representation. The issue is currently a hot topic in immigration cases, given positions taken by the Executive Office for Immigration Review that prohibit limited appearances.[4]

When unbundling is permissible and makes sense for a particular matter, the rules require the client to give "informed consent," which is specifically defined in the ethics rules as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable alternatives to the proposed course of conduct."[5]

In matters of limited representation, this Office has advised through many CLE presentations that informed consent requires communicating in plain English to the client (1) what services will be provided; (2) what services will not be provided; and (3) what the client will need to do on their own in order to achieve their objectives. While not required, it is best that this communication be in writing. (This also allows the attorney to comply with Rule 1.5(b), which requires that the scope of representation and the basis and rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing.[6]) If you provide limited representation, take a minute to review your retainer agreement to ensure that it's sufficient to satisfy the informed consent requirement.

Another ethics issue relates to communications with represented persons. Rule 4.2 prohibits communication about the subject of the representation with a person you know to be represented by another lawyer.[7] Limited representations may create ambiguity for opposing counsel. You (as opposing counsel) should always address communications to a lawyer working on a matter, unless and until that lawyer consents to your direct contact with the client or clearly advises you that the issue to be discussed is outside the representation. If you do not know whether an opposing party is represented by counsel, either generally or on a limited basis, you may ask the party, and then get clarity from counsel as to the scope of the representation. In 2015, the ABA issued a helpful formal opinion you may wish to review: "Communication with Person Receiving Limited-Scope Legal Services."[8] As an attorney providing limited representation, you should assist opposing counsel in navigating these issues by clearly advising on which matters direct communication is permitted and where it is not.

Another ethics question that arises in limited representation is the issue of "ghostwriting," or authoring pleadings or other court filings on behalf of a self-represented litigant without signing those documents or otherwise disclosing lawyer assistance in preparing them. The ABA has fully endorsed this practice,[9] but some states and federal circuits have raised a concern that the practice may run afoul of Rule 11 of those jurisdictions' civil procedure rules. The 10th Circuit, for instance, prohibits the practice under Rule 11(a), requiring that an attorney whose advice results in a pleading must sign that pleading.[10]

In addition to Rule 11 concerns, some courts have raised the issue of whether a party unfairly benefits from the liberal pleading rules afforded to *pro se* litigants if an attorney has ghostwritten the pleading, and whether ethical considerations like the duty of candor are undermined by ghostwriting. North Dakota amended its Rule 11 in 2016 to make clear that an attorney may prepare a pleading, brief, or other court filing for use by a self-represented litigant without being required to sign such a document.[11] This Office has advised that the best practice, if you are ghostwriting, is a) to ensure that any pleading is not frivolous and has a good-faith basis in law and fact, even if you will not be signing such a document; b) to indicate on the pleading that you assisted in its preparation; and c) to keep a copy of the pleading in the form that you provided it to the client (to clarify matters if issues later arise).[12]

Additional considerations

No matter the scope of your representation, Rule 1.1 requires your representation to be competent. And, remember, competency is more than just knowing the law: It includes "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[13] Limited representation presents unique challenges in making sure that you have sufficient information to provide competent advice. You also cannot ask your client to prospectively waive or limit your malpractice exposure due to the limited nature of the representation. Ethically, in order to limit your malpractice exposure, the client must be independently represented by counsel in making such an agreement.[14]

Conclusion

For decades, transactional lawyers have provided limited representation. And for several years now, more and more attorneys have been providing limited representation in litigated matters. Given the number of self-represented litigants in civil matters (some reports indicate that up to 80 percent of civil cases have one unrepresented party), the interests of justice are advanced when litigants have some access to competent representation, even if they cannot afford full representation.

As in most areas of practice, client communication is the key. Make sure your client has provided informed consent, preferably in writing, and continue to be very clear about what you are doing and what is required of your client. Scope-creep is natural, and can defeat the best-laid early plans. If you choose to offer limited services to your clients, whether on a pro bono basis or for a fee, know that there is a wealth of information available to assist you. One such resource is the ABA's Unbundling Resource Center, maintained by the ABA's Standing Committee on the Delivery of Legal Services.[15] You can also call this Office for an advisory opinion at (651) 296-3952. Good luck! ▲

Notes

1 *See* "Ethical Considerations in Providing Unbundled Legal Services," Patrick R. Burns, *Minnesota Lawyer* (2/7/2005), available at *lprb.mncourts.gov*, under "articles." "Unbundling is the provision of limited legal services to persons with no undertaking by the lawyer providing services to provide the complete, 'bundled' set of services necessary to achieve the client's legal objectives."

2 Rule 1.2(c), Minnesota Rules of Professional Conduct (MRPC).

3 *In re Bulen*, 375 B.R. 858 (D. Minn. 2007).

4 *See Northwest Immigration Rights Project v. United States Department of Justice*, Case No. 2:17-cv-00716 (W. Dist. Wash.), seeking an injunction preventing the EOIR from enforcing a cease and desist letter dated 4/5/2017, relating to limited scope representation in detention proceedings.

5 Rule 1.0(f), MRPC.

6 Rule 1.5(b), MRPC.

7 Rule 4.2, MRPC.

8 ABA Formal Opinion 472 (11/30/2015).

9 ABA Formal Opinion 07-446 (5/5/2007).

10 *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001).

11 Rule 11(e)(1), N.D.R.Civ.P. (2016).

12 "Opportunity for All or Pandora's Box," Scott Russell, Bench & Bar (Feb. 2007), available at *http://mnbenchbar.com/2007/02/opportunity-for-all-or-pandoras-box/*, last visited 9/18/2017.

13 Rule 1.1, MRPC.

14 Rule 1.8(h), MRPC.

15 *https://www.americanbar.org/groups/delivery_legal_services/resources.html*, last visited 9/18/2017.