

The New York State Bar Association

**Commission on Providing Access to Legal
Services for Middle Income Consumers**

**Report and Recommendations on
“Unbundled” Legal Services**

December, 2002

The Commission is solely responsible for the contents of this report and the recommendations contained herein. Unless and until adopted in whole or in part by the Executive Committee or House of Delegates of the New York State Bar Association, no part of the report should be considered the official position of the Association.

REPORT

The Commission on Providing Access to Legal Services for Middle Income Consumers has been examining the use of segmented or “unbundled” legal services, that is, the performance by a lawyer of limited or discrete tasks for a client in the context of a larger matter that the self-represented client is otherwise handling. Unbundling is seen as a way to increase legal access for middle income consumers and improve lawyer profitability. Clients find unbundling attractive because it saves money and gives them more control over the process and strategy decisions.¹

Issues Addressed by the Commission

The Commission addressed five issues:

1. Whether a lawyer should be permitted to enter a limited court appearance on behalf of a client.
2. Whether and under what circumstances a lawyer should be permitted to prepare pleadings and other court papers for clients without entering an appearance on behalf of the client – sometimes referred to as Ghost-writing.
3. Whether a lawyer should be able to limit the scope of representation of a client in matters that do not require court proceedings if the client consents.
4. Whether the conflict of interest rules should be amended so that special rules apply to lawyers who provide limited legal services to clients with limited financial means as part of a non-profit or court-annexed legal services program.
5. Whether and to what extent malpractice issues may be a barrier to “unbundling”.

¹ Unbundling is also known as “discrete task representation” and has been considered by the judiciary and bar associations of a number of states including Arizona, Colorado, California, Florida, Maine, Maryland, Michigan, Virginia, Washington, Wisconsin and Wyoming; and by the ABA Ethics 2000 Commission. Maine and Wyoming amended their professional conduct and practice rules in July, 2001 and January, 2002, respectively, to permit lawyers to assist an otherwise unrepresented litigant on a limited basis without undertaking full representation of the client on all issues related to the legal matter for which the lawyer is engaged in both litigated and transactional matters.

The Commission approached its consideration of these issues with the premise that our current disciplinary rules and ethical considerations should not be changed in any way that might erode the integrity or competence of our profession, and that no lawyer should enter into an agreement for limited representation if the effect is providing less than competent and zealous representation. The Commission focused primarily on applying unbundling to middle income consumers and not to persons who cannot afford the services of a lawyer and who need pro bono litigation assistance.

Recommendations

The Commission makes the following recommendations, which will be discussed in more detail below:

1. Limited appearances in litigated matters should not be permitted as a general matter.
2. A lawyer should be permitted to prepare or help a self-represented person to prepare court papers, without entering an appearance in the case, provided that the adversary parties and the court are informed that the papers were prepared by an attorney, and the papers set forth the name, address and telephone number of the attorney.
3. Segmented legal representation already occurs regularly in non-litigated matters, and the Commission believes that such representation is already permitted by the Code of Professional Responsibility. The Committee recommends that a new ethical consideration be added to the Code to make this clear.
4. Special conflict of interest rules should apply to lawyers who provide limited legal services to clients with limited financial means as part of a non-profit or court-annexed legal services program.

5. Malpractice liability arising in unbundling is covered by a standard professional liability policy provided the lawyer has an engagement agreement clearly stating the limited scope of the services.

Comments by Other Committees

The Commission held a meeting on September 25, 2001, that was attended by guests including Prof. Bruce A. Green of Fordham Law School, (former Chair of the Committee on Professional Ethics), and following that meeting, the Chair sought comment from the Chairs of the Committee on Attorney Professionalism; Committee on CPLR; Committee on Professional Ethics; Committee on Standards of Attorney Conduct; and, subsequently, the Committee on Legal Aid and the Criminal Justice Section.

Comment was received from the CPLR Committee, chaired by Steven M. Critelli; and the Committee on Standards of Conduct, chaired by President Steven C. Krane.

Generally, the CPLR Committee took the position that “limited representation in a litigation context is impractical for procedural, administrative and economic concerns and is thus ill-advised.” It went on to state that there appears to be no ethical rule or practical reason for prohibiting an attorney from providing limited representation in transactional or other non-litigated matters provided the client has requested information related to the matter and the attorney’s limited representation is consistent with ethical considerations concerning competence and informed consent. The Committee on Standards of Attorney Conduct also was not in favor of permitting attorneys to enter limited appearances in litigation matters as it would “raise too many risks of prejudice to the administration of justice as well as invoking substantial competence concerns.” It did agree with the Commission that in some circumstances representation of a client may be limited provided the nature and scope of the services to be rendered is clearly explained and comprehended by the client. The Committee further expressed the view that no amendment to the disciplinary rules is required to accomplish the goals of limited

representation (“unbundling”) in a non-litigation context. It believed that appropriate language could be added to the Code of Professional Responsibility using Ethical Considerations (suggesting possible additions to existing EC 7-7 or 7-8). The benefit of that approach is that the NYSBA House of Delegates has the power to create or amend ethical considerations (EC’s) whereas amendment of the disciplinary rules is within the sole power of the four Departments of the Appellate Division.

Discussion

NYSBA has a continuing responsibility to examine its rules, policies and procedures of ethics and practice to ensure that they provide access to justice and the delivery of affordable legal services to all, and in particular, middle income consumers and the poor. Our common goal is to enhance ways to permit lawyers to serve a client’s needs for unbundling where the client prefers or needs to be self-represented.

Limited Appearance in Litigated Matters

The Commission believes that unbundling in a litigated matter raises significant practical and policy difficulties, and could generally prejudice the administration of justice and raise ethical concerns regarding competence. Those concerns are set forth in the attached comments of the Committee on Civil Practice Law and Rules and the Committee on Standards of Attorney Conduct. Accordingly, the Commission recommends that, as a general matter, limited appearances not be permitted in litigation.² The Commission appreciates that if a limited appearance in a litigated matter is not permitted, the result will be to bar the vast majority of cases where such “unbundling” arguably would be helpful. Consideration was given to whether a new rule might permit

² If a limited appearance to accommodate unbundling were considered desirable, an amendment to CPLR Rule 321 would be required. Section 321 provides that if a party appears by an attorney, the party may not act in person in the case “except with the consent of the court” and that an attorney of record may not withdraw or be changed “without an order of the court in which the action is pending”. Such an amendment could be an addition to sub-paragraph (a) substantially as follows: “An attorney may, upon written agreement with a client, enter an appearance limited on tasks and objectives. The attorney who has filed a

a limited appearance “with the consent of the court”.³ However, the Commission concluded that if such were the case the court would be faced with the same practical difficulties and ethical issues as an attorney accepting a limited appearance representation, and no judge would likely welcome the burdens of such an inquiry. In addition, we have concern about the trend generally of transferring control of cases from lawyers to the courts.

The Commission is mindful, however, that Chief Administrative Judge Jonathan Lippman and Judge Juanita Bing Newton have expressed interest in the use of unbundling in a litigation context, primarily in matrimonial and landlord-tenant matters where persons with less than modest means appear self-represented.⁴ The Commission recommends that NYSBA support use of a limited appearance by specific court-annexed or non-profit legal services programs that are structured to accommodate an appearance limited in tasks and objectives. The Commission believes that OCA needs to critically examine how the courts deal with matrimonial and landlord-tenant cases and create programs to accommodate its conclusions. The Commission’s responsibility is to recommend to NYSBA the “permission and parameters for lawyers to participate in programs that offer unbundling”, but not to recommend any specific program

Ghost-writing of pleadings, motion papers and related documents

In New York, an attorney may provide unbundled services for the preparation of pleadings and other court documents, but not without disclosure. The Association of the Bar of the City of New York has opined that an attorney who drafts a pleading need only

limited appearance may withdraw when the objectives set forth in the appearance have been fulfilled.”

³ The Commission also considered, but decided against, recommending a pilot program under a Uniform Rule that might authorize a limited appearance in certain kinds of cases, including landlord-tenant and domestic relations.

⁴ Most of the literature and discussion of unbundling centers on family law and housing matters that seem to be overwhelming the court system.

state “prepared by counsel” without including the attorney’s name. NYSBA Ethics Opinion 613 allows attorney preparation of pro se pleadings, provided the court is informed of the name of the attorney.

CPLR 2101(d) provides that each paper served or filed shall be endorsed with the name, address, and telephone number of the attorney for the party, or if the party does not appear by attorney, the name, address and telephone number of the party. If an attorney prepares a pleading on an unbundled basis for a self-represented litigant and delivers it to the self-represented person in a form intended to be submitted directly to the court, the attorney has a duty to see to it that the name, address and telephone number of the attorney appears on the pleading. On the other hand, if the attorney reviews a pleading already prepared by the self-represented person and makes a suggestion that a particular allegation or sentence should be added to the pleading, e.g., “that there is no other proceeding pending between the parties to the action,” and does not otherwise author the entire document, then the rule may not have been violated. In such a case, however, it is believed the self-represented litigant should be required to disclose that the pleading, although not prepared by a lawyer, was reviewed by one. In any case, an attorney who has given any advice for a fee in review of a document is subject to the ethical duty to have acted competently.

The Commission does not believe any new rule or commentary is needed to permit or clarify the scope of permitted unbundling on this subject.⁵ Nevertheless, if one were considered helpful, it might take the form of an amendment to CPLR Rule 2101(d)

⁵ A review of these and related issues appeared in the Fordham Urban Law Journal, February, 2002, “In Defense of Ghost-Writing”, by Jona Goldschmidt, an associate professor of criminal justice at Loyola University, Chicago. Professor Goldschmidt’s article points out that there does not appear to be any harmful effects on the administration of justice from ghost-writing, except for whether a pro se litigant is or is not represented and for what purpose, although he points out that courts that have dealt with the issue uniformly condemn self-representation. State bar reports on the issue of ghost-writing do not show any consensus: Michigan permits it, but requires full disclosure of the attorney’s identity; California permits it, without mandatory disclosure, but holding ghost-writers to all pleading and ethical rules; and Kansas resolved to study the issue further.

to add: "If a pleading has been prepared by an attorney not appearing in the case, the pleading shall state the name of the attorney or firm, but such disclosure shall not constitute an appearance".

Limited Representation in Non-Litigation Matters

Segmented legal representation already occurs on a regular basis in non-litigation matters, and the Commission believes that the Code of Professional Responsibility already permits such representation with the consent of the client. The Commission recommends, however, that a new Ethical Consideration (EC) be adopted to make it clear that a lawyer may ethically limit the scope of the representation of a client if the client consents.⁶ The Commission concurs with the advice of the Committee on Standards of Attorney Conduct that creating a new Ethical Consideration (EC) is preferable to a specific Disciplinary Rule (DR) to make clear that in appropriate circumstances a limited representation agreement is permissible. The goal is to make clear that an attorney may limit the scope of representation of a client if the limitation is reasonable under the circumstances and the client, following consultation, gives informed consent.

A difficult issue faced by lawyers relates to the competency of the client and the extent to which the lawyer must make a judgment of a client's ability to handle tasks not part of the limited representation without fear of malpractice. We are also mindful that no agreement may limit a lawyer's liability for malpractice or a breach of a disciplinary rule.

⁶ The Florida Bar was ordered by the Florida Supreme Court to study the possible need for unbundling and if a need existed to submit to the Court proposed rules. The Report of The Florida Bar is attached as Exhibit 4. The report concluded in part that the existing Florida Rules of Professional Conduct presently accommodate "unbundling". Florida Rule 4-1.2(c) states that "a lawyer may limit the objectives of the representation if the client consents after consultation". Concern, however, was expressed (a) about the disclosure required to cause the consent to be adequate and (b) the adequacy of its current ethics rules on disclosure of an attorney who drafts pleadings for pro se litigants in providing only that the pleading be marked "prepared with the assistance of counsel".

Canon 6 deals with lawyer competency and the prohibition of a limitation on liability. Canon 7 deals with representing a client zealously. The Commission recommends consideration of the addition of EC 6-7 to Canon 6.

“A lawyer may limit the scope of the representation of a client if the limitation is reasonable under the circumstances and the client provides informed consent following consultation. For an agreement of limited representation to be reasonable under the circumstances, the lawyer should consider the general ability of the client to handle the facts and general information about the law involved to understand the issues, and whether the lawyer is able within the limitations of the representation to do adequate investigation and preparation. The lawyer may rely upon the representations of the client. It is preferable to have the client’s informed consent to a limited representation agreement in writing. In no event, however, may an agreement limit a lawyer’s obligation to provide competent representation or provide for a limitation on liability”.

Some members of the Commission believe that the proposed EC 6-7 should be limited to the first and last sentences because the issue of “informed consent” will likely invite litigation that otherwise would have no merit. Others believe that the agreement of limited representation must be in writing.

We have chosen to present for consideration an EC that covers the issues of a limitation on the scope of representing a client in any type of legal matter, whether it is litigated or non-litigated.

We also considered whether we should recommend the promulgation of an approved “model” limited representation retainer agreement as a safe-harbor. The Commission reviewed the Maine Bar Rules amended July 1, 2001 to explicitly approve limited representation (in litigated and non-litigated matters) and the form Limited Representation Agreement authorized thereunder and which by its terms is not intended to be exclusive to the use of other forms consistent with its rule. The Commission is also mindful of: New York’s rules effective March 4th for engagement letters; and the practical difficulties of participation in a non-profit or court-annexed legal services program.

The Commission concludes that it is preferable to set forth what is required for the legal efficacy of a limited services agreement (such as a new EC 6-7) rather than provide a form.

Not-For-Profit and Court-Annexed Limited Legal Service Programs

OCA has a keen interest in lawyers being able to participate in such programs without fear of violating rules of ethics. Programs through which lawyers provide limited legal services (typically consultation advice) that assist persons with limited means, without further representation by a lawyer, are viewed as indispensable to providing meaningful access to justice. A lawyer representing a client in such circumstances normally would not be able to check for a conflict of interest. A lawyer should be able to comply with conflict of interest rules if the lawyer does not know, based upon reasonable recollection and information provided by the client, that the representation would produce an actual conflict of interest. Imputed knowledge would not be relevant to a lawyer representing a client in a limited representation program; and the lawyer's participation in such a program would not preclude a lawyer's firm from undertaking or continuing a representation of clients with interests adverse to a client being represented under the program. Maine Bar Rule 3.4(j) provides as follows: "Non-profit and Court-Annexed Limited Legal Service Programs. A lawyer who, under the auspices of a non-profit organization or a court-annexed program, provides limited representation to a client without expectation, of either the lawyer or the client, that the lawyer will provide continuing representation is subject to the requirements of {conflict of interest rules} only if the lawyer knows that the representation of the client involves a conflict of interest." See also ABA Model Rule 6.5.

The Commission supports, in principle, amendments to conflict of interest ethics rules to enable lawyers to participate in non-profit and court-annexed limited legal

services programs, and recommends referral of them to the NYSBA committees on Professional Ethics and Standards of Attorney Conduct for review and recommendation.

Malpractice Insurance and Practice Considerations

One of the few reported instances of malpractice arising from unbundling concerns an attorney hired to give advice on a workers' compensation matter where the lawyer advised about the claim with the employer, but failed to advise the client about a lawsuit against a third party, presumably because that was outside the scope of a limited engagement. Nicholas v. Keller, 19 Cal. Rptr. 2d 601 (Cal. App. 1993). The lesson here is to have as explicit a limited engagement letter that is reasonable in scope and appropriate to the circumstances. This lesson is also evidence of the dilemma - - when is it reasonable and appropriate to the circumstances?

The Commission received advice from Kathleen R. Baxter, Esq., Counsel to NYSBA and a representative of the sponsor of the Association's professional liability insurance program, about coverage for attorneys who provide unbundled services. Basically, the carrier's position is that a standard professional liability policy covers the exposure as long as the lawyer has an explicit engagement letter clearly stating the limited scope of the services. Since the insurance policy provides coverage for performing professional services, there is no need for a separate policy to cover a limited engagement.

Competent handling of a particular matter presumes inquiry into the facts, circumstances and legal aspects of the matter. A limited services representation agreement must show more than the tasks to be done and the fees to be charged; it should also include a provision that the client acknowledges the risks and benefits of limited representation based upon the lawyer's evaluation of those risks and benefits as compared to full representation. A lawyer presumably would need to be able to extract a discrete task of limited representation from the rest of the case so that the limited advice, while

appropriate to the specific facts, might also not have an adverse or contradictory effect on some other aspect of the case. Limited representation is likely not appropriate for a complex matter, but most such matters likely have general representation by a lawyer. Malpractice issues are not whether you would be covered by the insurance carrier, but whether because of providing limited representation, the lawyer would be subjected to greater client unhappiness and complaints of malpractice. This kind of analysis is recommended before the lawyer chooses to accept a limited engagement.

Conclusions

The Commission believes that it has carried out its charge to review and report on the use of segmented legal services for middle income consumers. It is believed that ongoing issues regarding “unbundling” may be adequately dealt with by standing Committees and Sections. The continuation of the Commission and its charge remain subject to the pleasure of the Executive Committee.

December, 2002

Respectfully submitted,
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APPENDIX

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