

Ethical Considerations In Providing Unbundled Legal Services

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Reprinted from *Minnesota Lawyer* (February 7, 2005)

It will come as no surprise to anyone who spends a significant amount of time in the courtroom that there is an ever-growing number of people who appear pro se.

In an effort to assist the courts in dealing with this trend, the Minnesota State Bar Association's (MSBA) Pro se Committee, chaired by Susan Ledray and Gary Debele, is considering various changes to the Minnesota Rules of Civil Procedure and the Rules of Professional Conduct to facilitate the unbundling of legal services.

Just what is unbundling? Unbundling is the provision of limited legal services to persons with no undertaking by the lawyer providing those services to provide the complete, "bundled" set of services necessary to achieve the client's legal objectives.

Examples of unbundled legal services include:

- providing brief advice to pro se parties regarding causes of action they are pursuing or wish to pursue;
- reviewing and providing advice on proposed settlement agreements;
- assisting in the drafting of pleadings to be submitted to the court over the signature of the pro se party; and
- engaging in limited negotiations on behalf of a client without undertaking trial responsibilities if the matter is not settled.

Although the concept of unbundling legal services is authorized by the Minnesota Rules of Professional Conduct (MRPC), there are limits on how far a lawyer may restrict or limit his or her legal services. Rule 1.2(b) of the MRPC states that "a lawyer may limit the objectives of the representation if the client consents after consultation."

A proposed new Rule 1.2, currently before the Minnesota Supreme Court reads, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The comment to the current rule notes, "An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law."

Thus, it would be inappropriate to limit the scope of the representation to such an extent that the lawyer is not providing the minimal level of competence required by Rule 1.1. In addition, you cannot ask a client to prospectively waive or limit your malpractice liability unless you comply with the provisions of Rule 1.8(h), which requires that a client be separately represented in making such an agreement.

Communication is key

Another vital concern in agreeing to provide unbundled legal services to a client is communication. Rule 1.4(b) requires a lawyer to explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.

As already noted, the proposed change to Rule 1.2 regarding limiting the scope of the representation, requires the client's informed consent. Informed consent requires communicating to the client adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. See proposed MRPC Rule 1.0(f).

At a minimum, if a lawyer undertakes to represent a client on only a portion of a legal matter, the lawyer should clearly identify the services to be provided, the services that will not be provided, and what additional action will be necessary for the client to accomplish his or her legal objectives.

Ethical issues may also arise for lawyers who oppose clients being provided unbundled services by another lawyer. If the lawyer becomes aware that an opposing pro se party is being assisted by a lawyer on a limited basis, may the lawyer continue to communicate directly with the pro se party? Rule 4.2 provides, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Even limited representations of an otherwise pro se party could constitute a representation for the purposes of Rule 4.2. The prudent course of conduct in such situations would be to clarify with the lawyer providing the unbundled services the ability to communicate directly with his or her client.

These are just a few of the issues that are being considered by the MSBA Pro se Committee. Some of the issues, such as the ghostwriting of pleadings, involve a delicate balancing of competing public policy concerns (i.e., increasing the availability of legal assistance to low-income clients v. maintaining accountability for the allegations made in pleadings). The continued effective administration of justice requires that these interests be harmonized to the greatest extent possible.