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Caveat venditor: traps await lawyers selling unbundled services

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Lawyers hoping to cut costs to satisfy market demand for low-price legal services may be tempted to sell "unbundled" services. Unbundled, or limited-scope, representation allows an attorney to provide highly discrete legal services to a client without taking on an entire matter. The goal is to restrict an attorney's time and fees.

Under such arrangements, a narrow slice of the matter is handled by the attorney, leaving the rest for the client to handle on his own. While unbundled representation might prove useful for handling certain matters (e.g., the drafting of basic corporate documents), it may not be appropriate for others (e.g., anonymously writing pleadings in litigation). Before offering unbundled services, attorneys should be aware of the risks. Limited representation does not necessarily mean limited liability.

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Allowed — with conditions

The rules of professional conduct in Massachusetts and Rhode Island permit unbundled representation. Rule 1.2 of the Massachusetts Rules of Professional Conduct, effective as of July 1, states, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Massachusetts Rule 1.2 now matches Rule 1.2 of the Rhode Island Rules of Professional Conduct. Both provide that (1) the limited-scope representation must be reasonable and (2) the client must give informed consent.

Under the rules, lawyers in both states have practiced "ghostwriting," a particular form of limited-scope representation by which an attorney agrees to draft a complaint, answer, counterclaim, motion, or other court document for a client, while at the same time agreeing not to enter an appearance in the action. The client handles all other aspects of the litigation, including hearings and depositions, as a pro se litigant.

A June decision of the Rhode Island Supreme Court highlights some of the risks attorneys run when selling such a la carte legal services to their clients. In FIA Card Services, N.A. v. Pichette, the court reviewed three unrelated cases where trial court judges had sanctioned attorneys under Rule 11 for ghostwriting pleadings for pro se litigants without entering appearances in the actions.

A lawyer's signature under Rule 11 amounts to a statement by the lawyer that the pleading is brought in good faith and is not frivolous. After considering the particular cases of the three attorneys, the court reversed the trial court's sanctions, finding that Rule 11 did not apply to the drafting assistance provided by the non-signatory attorneys.

The justices went on to consider more broadly the practice of ghostwriting and unbundled representation of pro se litigants. The court declared that an attorney may provide legal assistance to litigants appearing pro se before the court, provided that (1) the scope of the attorney's representation is reasonable; and (2) the litigant gives informed consent in writing that sets forth "the nature and extent of the attorney-client relationship." Regarding ghostwriting, however, the court declared that, going forward, an attorney may not assist a pro se litigant with the drafting of pleadings, motions or other written submissions unless the attorney (1) signs the pleading; (2) discloses on the pleading, to the tribunal, and to all parties to the litigation her identity and the nature and extent of the assistance that he or she is providing to the pro se litigant; and (3) indicates, if applicable, that her signature does not constitute an entry of appearance.

The court in effect ended the practice of ghostwriting in Rhode Island, despite recognizing the hard reality that "for many litigants the choice is not between unbundled representation and full representation; it is between unbundled representation and no representation at all."

Massachusetts, on the other hand, continues to allow ghostwritten pleadings, motions and other court documents. According to the Massachusetts Supreme Judicial Court's 2009 Order on Limited Assistance Representation, attorneys may provide anonymous assistance in the preparation of documents filed with the court if the documents state that they were "prepared with assistance of counsel."

For anything more than the preparation of documents — for example, attendance at a deposition or hearing — attorneys are required to file a limited notice of appearance with the Court. As in Rhode Island, Massachusetts attorneys engaging in limited-scope representation under Rule 1.2 should get the client's consent in writing after consultation as part of the written engagement letter and should assess whether the representation is reasonable under the circumstances.

Risky business?

When providing limited-scope representation, the consequences of failing to follow the particular rules concerning ghostwriting are just the tip of the iceberg.

Unbundled representation may increase the risk of being sued for malpractice in certain circumstances. For example, if a pro se litigant is unsuccessful in court or faces an unexpected legal issue, he or she may sue the attorney for malpractice, even if any harm seemingly was caused by events occurring outside the limited scope. The aggrieved client may say, "you should have warned me about that," or "the document you drafted for me should have covered that issue," or "it wasn't my argument that lost in court, but your poorly drafted motion."

While the attorney may have defenses based, in part, on the limited scope of her representation, they may not be enough to avoid a lawsuit or protracted factual discovery. Furthermore, because the lawyer is involved in only a portion of the matter, she may not be able to exercise the control necessary to avoid these situations. Dissatisfied clients may seek to hold the attorney responsible for the whole, even though her representation was limited to a sliver.

Limited-scope representation also may increase the risk of inadvertent waiver of privilege. For example, lawyers drafting court documents in a limited-scope representation should be aware that pro se litigants asked during a hearing or deposition why they asserted a particular counterclaim, affirmative defense, or legal argument, may say that they do not know and that they made the claim or allegation because their attorney told them to do it.

Such an admission may open the door to waiver of privilege and factual inquiry directed at the attorney as to the basis for the pro se litigant's allegations. Furthermore, in making disclosures to the court or tribunal about her limited-scope of representation — as required in Rhode Island after FIA Card Services — the lawyer should be careful not to reveal attorney-client communications, work product or any other information that may disclose the client's legal strategy.

Because the attorney-client relationship in limited-scope representation is not as seamless as in full representation, both the limited-scope attorney and client need to be aware of the pitfalls that can lead to an inadvertent waiver of privilege.

Finally, unbundled representation offers sundry opportunities for running afoul of rules of professional conduct. As the Rhode Island Supreme Court recognized in FIA Card Services, limited-scope representation raises "myriad ethical and procedural concerns" related to, among other things, Rhode Island Rules of Professional Conduct 3.1 (meritorious claims), 3.3 (candor to the tribunal), 4.1 (truthfulness in statements to others), 4.3 (interactions with unrepresented persons) and 8.4 (prohibiting conduct involving dishonesty, fraud, deceit, and misrepresentations).

For example, if the pro se litigant says one thing in court, and his pleadings drafted by a limited-scope attorney assert something substantially different or even opposite — or if the pleadings state certain claims or defenses for which the pro se litigant can articulate no basis during a hearing or deposition — the court may find that the limited-scope lawyer has committed an ethical violation. Furthermore, opposing counsel in a case involving a pro se litigant using the services of a limited-scope attorney may face uncertainty as to whether and when she may contact the litigant directly. Until bright lines are drawn in this emerging ethical landscape, attorneys should proceed with caution.

Protect yourself

Lawyers and law firms can do several things to decrease the risks associated with unbundled representation:

- Consult with ethics counsel before offering unbundled legal services to clients.
- Keep current on the applicable jurisdiction's requirements concerning unbundled legal services and the rules for disclosing to the court, opposing counsel, and third parties any limited-scope representation, including for ghostwriting.
- Assess in consultation with the client whether providing unbundled legal services is reasonable under the client's particular circumstances.
- Ensure that the client executes a written engagement letter setting forth the client's informed consent and agreement, after consultation, to the limited scope of representation — and the fee structure. The agreement as to the limited scope of representation should articulate what the attorney will and will not do on behalf of the client. The attorney should state in writing that the client should consult with separate counsel before signing the engagement letter for limited-scope representation.
- Stick to the terms of the agreement. If the client wants to expand or change the attorney's role in the matter, amend the engagement and scope of services agreement to provide in writing the terms of the amended representation.
- At the conclusion of the limited-scope representation (i.e., after the attorney has provided to the client the enumerated legal services or deliverables), send the client a termination of representation letter stating that the representation is complete.
- Exercise particular caution when providing limited-scope representation in the context of litigation.

While these practice tips will help avoid certain pitfalls arising from selling unbundled representation to cost-conscious clients, they do not protect against every possible risk. As the courts continue to develop rules and requirements for limited-scope representation, attorneys would be wise to continue to live by the mantra "caveat venditor:" seller beware. MLW