

Unbundling of Services And The Practice of Law

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Two trends in the practice of law are gathering speed simultaneously but independently. Eventually, they will affect each other in ways which no one can now anticipate.

The first trend, born of the public perception that legal services are too expensive, is the increasing effort to promote segmented or "unbundled" legal services to clients who cannot afford to pay for all the legal services required in a particular litigation or matter. In an "unbundled" relationship, the client performs some of the work himself and the lawyer limits her role to those services which only a lawyer is deemed competent to handle. In Dec. 2002, the Commission on Providing Access to Legal Services for Middle Income Customers, appointed by the NYSBA, issued a report on "unbundled" legal services for NY lawyers. The focus of the Commission was the provision of legal services to middle income consumers. A footnote to the Commission's report stated:

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 second trend is the growing effort to create an all-encompassing definition of the practice of law. (See, NYPRR, February 2003, p. 10.) That this is a Herculean task is evidenced by the decision this month of the ABA Task Force on the Model Definition of the Practice of Law to abandon its work. The task force had recommended a definition which was opposed by the Federal Trade Commission, the Department of Justice and the Association of Professional Responsibility Lawyers (APRL). The task force rejected the APRL conclusion that no single definition could cover effectively all the ways in which a definition might be needed, but left the framing of a definition to the individual states. Utah and Arizona have responded by adopting definitions which are as different from each other as a lawyer can imagine.

The Arizona approach is the more conventional approach. The Arizona Supreme Court has listed all the areas which are usually reserved to lawyers - control of litigation; representation in formal dispute resolution; preparation of legal opinions; negotiation of legal rights and responsibilities for specific persons; preparation of documents "intended to affect specific legal rights for a specific person or entity;" and preparation of documents for filing in a court, agency or tribunal. The Arizona Court also defined the unauthorized practice of law.

The Utah approach was much narrower. A new Utah statute defined the practice of law solely in terms of the conduct of litigation:

...The term "practice law" means appearing as an advocate in any criminal proceeding or before any court of record in this state in a representative capacity on behalf of another person.

The legislative history behind the Utah statute illustrates the ways in which efforts at unbundling legal services and efforts at defining the practice of law may ultimately intersect. Described by one of its sponsors as an "attention-getter," the Utah statute was a draconian device intended to bring the Utah bar to the bargaining table over the availability of legal services to the middle class. [Note: The U.S. Census Bureau defines the middle class as any household with an annual income of \$45,000 or more.] The legislative force-play succeeded as intended - instead of asking the Governor to veto the bill, the Utah bar agreed with legislative leaders to a compromise which would lead to repeal of the narrow statutory definition in exchange for the bar's commitment to support, among other things, the "appropriate unbundling of legal services" and ways in which parties in small claim matters would be represented by uncompensated nonlawyers.

In the final analysis, therefore, the unbundling of legal services goes hand-in-hand with a redefinition of the practice of law. To the extent that lawyers are encouraged to remove themselves from activities they now control, nonlawyers will fill the void. As these nonlawyers move in, the practice of law will be defined more and more narrowly.

This result is demonstrated in the five issues considered by New York's Commission (*supra*) and the Commission's recommendation on each issue:

Issue 1. Should a lawyer be permitted to enter a limited court appearance on behalf of a client? Recommendation: As a general matter, limited appearances in litigated matters should not be encouraged. Unbundling in litigation raises significant practical and policy difficulties and could "prejudice the administration of justice and raise ethical concerns regarding competence." The Commission considered a new rule allowing a limited appearance "with the consent of the court," but rejected that idea because "we have concern about...transferring control of cases from lawyers to the courts." Mindful of Judge Lippman's interest in the use of unbundling "primarily in matrimonial and landlord-tenant matters where persons with less than modest means appear unrepresented," the Commission recommended that the NYSBA support the use of non-profit or court-annexed legal service programs structured to accommodate appearances limited "in task and objective."

2. Should a lawyer be permitted to prepare pleadings and other court papers for a client without entering an appearance on behalf of the client (called "Ghost-writing")? Recommendation: Provided the adversary and the court are informed that court papers were prepared by an attorney, the attorney need not enter an appearance. The papers must, however, show the name, address and telephone number of the attorney. The Commission felt this was consistent with present practice and did not require a new rule. It might be helpful, however, to amend CPLR Rule 2101(d) to make it even clearer.

3. Should a lawyer be able to limit the scope of a client's representation in transactional matters, if the client consents? Recommendation: Segmented legal representation occurs regularly in non-litigated matters and the Commission believes it is already permitted by the Code. To make this clearer, a new EC 6-7 should

be added to Canon 6. The new EC would require the client's consent, preferably in writing, and would instruct the lawyer to consider "the general ability of the client to handle the facts and general information about the law..." and whether the lawyer is able to do adequate investigation and preparation within the limits of the segmented representation. "...no agreement may limit a lawyer's liability for malpractice or a breach of a disciplinary rule."

4. Should the conflict of interest rules be amended to create special rules for lawyers who provide limited legal services for clients with limited financial means as part of non-profit or court-annexed legal services programs?

Recommendation: Yes, special rules should apply to these lawyers. A lawyer representing a client in these circumstances would not be able to check for conflicts. The rules should require essentially only that the lawyer have no personal knowledge of any conflict.

5. Should malpractice issues be a barrier to unbundling. If so, to what extent? Recommendation: Malpractice liability issues arising out of unbundling are covered by standard professional liability policies provided the lawyer "has an engagement agreement clearly stating the limited scope of the services." Before accepting the assignment, the individual lawyer should analyze whether the limits of the representation might lead to greater client unhappiness and potential complaints.