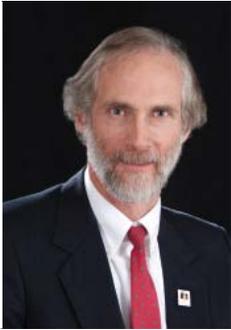


ETHICALLY SPEAKING



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Forming the Lawyer-Client Relationship Part IV: Limited Representation¹

The last three Ethically Speaking columns addressed problems when a lawyer forms a lawyer-client relationship. Part I discussed the elements and nature of the relationship. Part II² focused on problems when representing organizations. Part III³ expanded on Part II by looking at the problems that arise when a lawyer is asked to form a new entity. This column addresses some unique provisions of the Wyoming Rules of Professional Conduct (“the Rules”) which permit lawyers to limit their representation of clients—to provide what are often described as “unbundled” legal services.

Nearly a decade ago, former Chief Justice Lehman appointed the Citizens Access to Courts Committee (CACC). Originally known as the Pro Se Litigation Committee,⁴ the Committee was formed “to examine the issues of citizens’ access to courts in Wyoming . . .”⁵ Its charge was to “promote and efficiently manage citizens’ access to courts in Wyoming.”⁶ The CACC proposed increasing access to the courts by changing the Rules to encourage “unbundling” legal services. (“Unbundling” legal services refers to the idea that a lawyer may provide a limited service to a client, such as reviewing a document or making a limited court appearance, rather than providing comprehensive services.)

Although the Rules were changed, the problem of access to the courts remains and may even be getting worse. This column is to remind lawyers of the changes, and to encourage them to use “unbundling” services to help persons, especially low-income ones, gain access to the courts.

Providing limited representation re-

flects a substantial departure from the traditional notion that a lawyer must provide complete representation to a client. Accordingly, allowing a lawyer to provide limited services was generally not in accord with the ethical and legal obligations lawyers owe clients.

Rule Changes Permit “Unbundled” Legal Services

Rule 1.1 requires lawyers to be competent.⁷ While the general requirement is unchanged, comment [5] to Rule 1.1 was modified to explain⁸ what competence means in the context of limited or unbundled legal services:

A lawyer and a client may agree. . . to limit the scope of the representation. In such circumstances, competence means the legal knowledge, skill, thoroughness and preparation reasonably necessary for the limited representation.⁹

Though the standard remains the same, reasonable will be determined by the scope of the representation. Accordingly, what is reasonable in a limited representation may not be reasonable in another context. For example, if the limited representation is to review a divorce complaint, it may well be reasonable to simply review the document rather than make a reasonable inquiry into the factual and legal basis for the pleading as is normally required by Rule of Civil Procedure 11 and Rule 3.1(c).¹⁰

The second, and perhaps most important, change was to Rule 1.2. Subsection (c) now says:

A lawyer may limit the scope of the representation . . . if the limitation is reasonable under the circumstances and the client makes an informed decision.

- (1) The limitation(s) must be fully disclosed and explained to the client in a manner which can reasonably be understood by the client.
- (2) Unless the representation of the client consists solely of telephone consultation, the disclosure and consent required by this subsection shall be in writing.
- (3) The use of a written notice and consent form approved by, or substantially similar to, a form approved by the Board of Judicial Policy and Administration shall create the presumptions that:
 - (i) the representation is limited to the attorney and the services described in the form; and
 - (ii) the attorney does not represent the client generally or in any matters other than those identified in the form.

The Rule contains three important features. First, a lawyer and a client may agree to limit the means and the objectives of the representation (“the scope”).¹¹ The objectives, of course, are the client’s goals. The means are how those objectives are to be attained.

Second, the Rule imposes procedural requirements. “[T]he limitation(s) [must be] fully disclosed and explained to the client in a manner which can reasonably be

understood by the client.”¹² What can be “reasonably understood by the client” will of course vary. A sophisticated businessperson can be reasonably expected to understand many things which a poorly educated person cannot. Accordingly, lawyers will need to be sensitive to their clients’ abilities and adjust their language accordingly.

After disclosing the limitations(s)¹³ to the client, a lawyer must obtain the client’s “informed decision” to the limitation(s). As with any client decision, it must be informed.¹⁴ A client may agree, therefore, only “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”¹⁵

To protect both lawyers and clients who are agreeing to limited representation, the limitations and the agreement to them must be in writing unless the consultation is telephonic: “Unless the representation of the client consists solely of telephone consultation, the disclosure and consent required by this subsection shall be in writing.”¹⁶

To avoid imposing significant additional work on lawyers, a notice and consent form, approved by the Board of Judicial Policy and Administration, has been included as an Appendix to the Rules.

Using the form included in the Appendix will not only be convenient, it will provide additional protection for lawyers:

- (3) The use of a written notice and consent form approved by, or substantially similar to, a form approved by the Board of Judicial Policy and Administration shall create the presumptions that:
 - (i) the representation is limited to the attorney and the services described in the form; and
 - (ii) the attorney does not represent the client generally or in any matters other than those identified in the form.¹⁷

Telephone consultations are exempt since the lawyer may never meet or see the client. This exception is explained in Comment [7].

Comments [6], [7], and [8] explain

Rule 1.2(c), and all appear under the heading “Agreements Limiting Scope of Representation.”

Comment [6] explains the general concept of limiting the “objectives or scope” of the representation. The comment illustrates how the concept of limited services has been a part of the Rules since they were first adopted in 1986.

Comment [7] provides a comprehensive description of “unbundled” services:

Subsection (c) is intended to facilitate the provision of unbundled legal services, especially to low-income clients. “Unbundled” means that a lawyer may agree to perform a limited task for a client without incurring the responsibility to investigate or consider other aspects of the client’s matter. Accordingly, a lawyer and a client may agree, in writing, that the lawyer will perform discrete, specified services. The agreement need not be in writing if the representation consists solely of telephone consultation between the lawyer and the client. In such circumstances, the lawyer should maintain a written summary of the conversation(s), including the nature of the requested legal assistance and the advice given. Pursuant to paragraph (c), therefore, a lawyer and a client may agree that the lawyer will: (1) provide advice and counsel on a particular issue or issues; (2) assist in drafting or reviewing pleadings or other documents; or (3) make a limited court appearance. If a lawyer assists in drafting a pleading, the document shall include a statement that the document was prepared with the assistance of counsel and shall include the name and address of the lawyer who provided the assistance. Such a statement does not constitute an entry of appearance or otherwise mean that the lawyer represents the client in the matter beyond assisting in the preparation of the document(s). Further, any limited court appearance must be in writing pursuant to Rule 102 of the Uniform Rules for the District Courts of Wyoming, and must describe the extent of the lawyer’s involvement. See

also, Rule 6.5, Non-profit Limited Legal Services Programs.

To further facilitate the provision of unbundled services, the Board of Judicial Policy and Administration has approved a notice and consent form which may be used to comply with this rule. As paragraph (c)(4) [should be “(c)(3)”] indicates, using such a form will create the presumption that the lawyer has complied with this rule, as well as the presumption that the lawyer owes no additional duties to the client. The approved notice and consent form is attached as an appendix to these rules.¹⁸

The comment contains important guidance in several areas. First, it explains that “[u]nbundled means that a lawyer may agree to perform a limited task for a client without incurring the responsibility to investigate or consider other aspects of the client’s matter.”

Second, the comment explains that the disclosure and consent should be in writing, except when the consultation occurs solely via telephone.¹⁹

Third, the comment sets out the three general categories of unbundled legal services: (1) provide advice and counsel on a particular issue or issues; (2) assist in drafting or reviewing pleadings or other documents; or (3) make a limited court appearance. These three categories are reflected on the Board-approved Notice and Consent form which is included in the Appendix to the Rules.

A common request for limited representation will be for help in drafting a pleading. If a lawyer does so, the lawyer must indicate his or her involvement: “If a lawyer assists in drafting a pleading, the document shall include a statement that the document was prepared with the assistance of counsel and shall include the name and address of the lawyer who provided the assistance. Such a statement does not constitute an entry of appearance . . .” The purpose is to let the court know a lawyer was involved, that the lawyer’s involvement was limited, and the lawyer does not have the responsibilities normally associated with having one’s name on a pleading, i.e., notifying the court of one’s limited involvement does not consti-



tute an entry of appearance.

Allowing a lawyer to make a limited appearance is an important change. Historically, entering an appearance for a client in court meant that the attorney represented the client “for all purposes.”²⁰ This was a huge barrier to unbundling legal services, and its removal greatly facilitated limited appearances. Changing the Rules of Professional Conduct alone was not enough to implement this change. Other rules had to be changed as well. Most importantly, Rule 102 of the Uniform Rules of District Court had to be amended and now expressly allows limited appearances in civil cases: “Except in a criminal case, a written entry of appearance may be limited, by its terms, to a particular proceeding or matter.”²¹ The rule goes on to state that “except as otherwise limited by a written entry of appearance, an appearing attorney shall be considered as representing the party or parties for whom the attorney appears for all purposes.”²² Finally, a lawyer who enters a limited appearance need not then file a motion to withdraw after completing the limited appearance: “An attor-

ney who has entered a limited entry of appearance *shall be deemed to have withdrawn* when the attorney has fulfilled the duties of the limited entry of appearance.”²³ The same standard applies in Circuit Courts since the Uniform Rules for District Courts are adopted by reference in the Uniform Rules for Circuit Courts.

Finally, the comment reiterates the benefits of using the approved Notice and Consent form. Doing so “will create the presumption that the lawyer has complied with this rule, as well as the presumption that the lawyer owes no additional duties to the client.”²⁴ The form is an Appendix to the Rules and is available on the Wyoming Supreme Court’s website.²⁵

Changes to the ethical standards do not, of course, automatically change the legal standard required of lawyers. The legal standard is essentially the same; “a lawyer is held to ‘that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer . . .’”²⁶ Until the issue has been resolved by the Wyoming Supreme Court,

one cannot state with certainty that a lawyer who ethically provides reasonable limited legal services has also fulfilled the lawyer’s legal obligation. Two arguments weigh heavily in favor of a finding that satisfaction of one’s ethical obligations regarding limited legal services is tantamount to fulfilling one’s legal obligations. First, the rules of ethics have been admitted as evidence of the legal standard of reasonableness in the vast majority of states.²⁷ (The 2006 Wyoming Rules say, “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”²⁸) Second, it seems unlikely that the court would find that a lawyer who acted ethically pursuant to rules recommended by the CACC, which was appointed by the then Chief Justice, has a legal obligation to do more. ⁶

ENDNOTES

1. John M. Burman, *Forming the Lawyer – Client Relationship, Part I: the Nature and Elements of the Relationship*, Vol. 35, No. 4, WYOMING LAWYER 40 (August 2012).
2. John M. Burman, *Forming the Lawyer – Client Relationship, Part II: Special Considerations When Representing an Organization*, Vol. 35, No. 5, WYOMING LAWYER 48 (October 2012).
3. John M. Burman, *Forming the Lawyer – Client Relationship, Part III: Special Considerations When Representing a New Organization*, Vol. 35, No. 6, WYOMING LAWYER 48 (December 2012).
4. In the Matter of Establishment of Citizens' Access to Courts Committee, Wyoming Supreme Court, March 8, 2001.
5. *Id.*
6. *Id.*
7. WYOMING RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (LexisNexis 2011).
8. "The Comments accompanying each Rule explain and illustrate the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." WYOMING RULES OF PROFESSIONAL CONDUCT, Scope [9] (LEXIS 2002).
9. *Id.*, Rule 1.1, cmt. [5].
10. WYO. R. CIV. P., 11(b) (LexisNexis 2011) and WYOMING RULES OF PROFESSIONAL CONDUCT, R. 3.1(c) (LexisNexis 2011).
11. WYOMING RULES OF PROFESSIONAL CONDUCT, R. 1.2(c) (LexisNexis 2011).
12. *Id.*, Rule 1.2(c)(1).
13. *Id.*, Rule 1.2(c).
14. A lawyer must always "explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . ." *Id.*, Rule 1.4(b). Although Rule 1.4(b) refers to clients, the principle of informed consent "is equally applicable" to the negotiations between a lawyer and a prospective client about the financial terms of the relationship. ABA Formal Op. 93-379 (December 6, 1993) ("Billing for Professional Fees, Disbursements and Other Expenses.")
15. WYOMING RULES OF PROFESSIONAL CONDUCT, R. 1.0(f) (LexisNexis 2011).
16. *Id.*, Rule 1.2(c)(2).
17. *Id.*, Rule 1.2(c)(3).
18. *Id.*, Rule 1.2, cmt. P7] (emphasis in original).
19. The burden is always on a lawyer to "show that it was unreasonable for a client to believe that an attorney-client relationship existed . . ." *Carlson v. Langdon*, 751 P.2d 344, 348 (Wyo. 1988).
20. UNIFORM RULES FOR DISTRICT COURTS OF THE STATE OF WYOMING, Rule 102(a)(2) (Lexis 2002).
21. UNIFORM RULES FOR DISTRICT COURTS OF THE STATE OF WYOMING, R. 102(a)(1)(c) (LexisNexis 2011).
22. *Id.*, Rule 102(a)(2).
23. *Id.*, Rule 102(c) (Emphasis added).
24. WYOMING RULES OF PROFESSIONAL CONDUCT, Rule 1.2, Cmt. [6] (LexisNexis).
25. Go to the Court's homepage, click on "Court Rules." Then select "Wyoming Rules of Professional Conduct for Attorneys at Law." After the index to the rules is the heading "Appendix I. Appendix to the Rule of Professional Conduct for Attorneys at Law." That's it. The address is <http://www.courts.state.wy.us/RULES/Professional%20Conduct%20for%20Attorneys.html#Appendix>.
26. *Moore v. Lubnau*, 855 P.2d 1245, 1249 (Wyo. 1993), quoting *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 73, 438 P.2d 865, 867 (1968).
27. For a discussion of the admissibility of rules of ethics in civil actions against lawyers, see *Note*, "The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard," 109 Harv. L. Rev. 1102 (1996).
28. WYOMING RULES OF PROFESSIONAL CONDUCT, Scope [19] (LexisNexis 2011).