By Donald R. Lundberg

Unbundled legal services or limited scope representation

Sometimes it's called "limited scope representation"; sometimes it's called "unbundled legal services." They are both ways of describing less-than-full-service legal representation. The usual paradigm for a legal representation is that the client turns responsibility for the entire matter over to the lawyer for handling. This is, of course, subject to the lawyer's obligation to defer to the client about the desired outcomes of the representation and consult with the client about the means to be used to achieve the client's desired outcomes. Indiana Rule of Professional Conduct 1.2(a).

Increasingly, we hear about lawyers who intentionally accept legal representations that involve only part of the work that is necessary to achieve the client's goals. What this entails will vary greatly from case to case. But a common example occurs when the lawyer drafts court papers and coaches the client about the court process, but the client handles the matter in court. Some clients seek out limited scope representation in order to maintain more control over their cases. Others seek out limited services because they can't afford to pay for full service representation.

But is it ethical?

Whatever the reason, this practice raises several professional responsibility questions, the first of which is: Is it proper? Rule 1.2(c) says that, "A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Obtaining informed consent involves communicating the risks and reasonable alternatives to the client. Rule 1.0(e).

If limited representation is unreasonable or illusory, it is inappropriate. Otherwise, it is permitted, so long as the client is informed about the pros and cons, and consents. Though not required, it is a good idea for the lawyer to make a clear written record of the limits on the scope and objectives of the representation. This protects the client by letting the client know what the lawyer will and will not do. And it protects the lawyer from later accusations that she acted inadequately to protect the client's interests.

Ghostwriters in the court

One type of limited scope representation that has generated controversy is when lawyers draft court documents for their clients, but the clients adopt them as their own work product and file them with a court. This practice is sometimes called ghostwriting.

There have been several federal court opinions over the years that have disapproved of lawyers who ghostwrite pleadings for their clients without disclosing their assistance to the tribunal. This view reflects the fact that in the federal court system judges are supposed to make allowances for some procedural errors by self-represented litigants that would not be tolerated if committed by a lawyer. *Haines v. Kerner,* 404 U.S. 519, 520 (1972). By having a lawyer secretly ghostwrite pleadings, the unrepresented litigant gets the best of both worlds – trained lawyer assistance and judicial leeway.

To disclose or not to disclose

In Indiana, the premise for federal intolerance of ghostwritten pleadings does not exist – at least in theory. Here, an unrepresented party will be held to the same pleading and practice standards as an attorney. *See, e.g., Foley v. Mannor,* 844 N.E.2d 494, 496 n.1 (Ind. Ct. App. 2006). Given that, is ghostwriting ethical in Indiana state courts? We don't have direct guidance, but bar association ethics opinions on this question from other jurisdictions are at odds. Some conclude that ghostwriting is *per se* unethical, usually under some variant of the idea that it is misleading to the tribunal. Some conclude that it is permissible so long as it is not in furtherance of a fraud. Some take the middle position that ghostwriting is not wrong, but undisclosed ghostwriting is.

Partially because, in practice, self-represented litigants do get some judicial leeway, I think the better practice is for the ghostwriter to make a simple disclosure on the documents: "Prepared by Jane Doe, Indiana Attorney No. xx-xxxxx." Of course, as a matter of self-protection, the ghostwriting lawyer will want to obtain from the client a clear understanding that the client will use the documents as drafted and not make alterations to them.

Is a formal appearance required?

Some have argued that Indiana Trial Rule 11 requires the ghostwriting lawyer to file an appearance. I think this reads too much into the rule. The function of Trial Rule 11 is to require that counsel of record sign pleadings and motions filed with the court. Counsel's signature constitutes a certification that counsel has read the document, believes it has merit, and it is not interposed for delay. I do not believe that Trial Rule 11 goes so far as to prohibit assistance to litigants by non-appearing counsel.

Colorado Rule of Civil Procedure 11(b) requires disclosure of the identity of the drafting lawyer on pleadings without deeming it to be a general appearance.

(continued on page 20)

Donald R. Lundberg
Executive Secretary
Indiana Supreme Court
Disciplinary Commission
Indianapolis, Ind.

A similar rule might be a good idea here. Without more, a court should not treat ghostwritten pleadings as an entry of general appearance, and it should not require further participation of drafting counsel in the case.

Though not formally appearing for a client, the ghostwriting lawyer shares many ethical obligations with lawyers who file formal appearances. Rule 8.4(a) prohibits lawyers from doing through others what they cannot do themselves. Rule 3.1 prohibits lawyers from bringing or defending frivolous proceedings. Thus, it should be no defense to a disciplinary charge that a lawyer merely assisted a client by ghostwriting pleadings in a case the lawyer knew to be without merit. Likewise, Rule 4.4 prohibits lawyers from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person." Even the behind-the-scenes lawyer will be culpable for violating this rule if he or she knowingly assists a client by drafting papers intended to unduly delay proceedings. *See* also Rule 3.2.

Still a 'real' client

Limited representation lawyers still have full attorney-client relationships with their clients, albeit with narrower responsibilities than in full scope representations. The lawyer still has a duty to act competently and diligently, to communicate appropriately with the client and to avoid conflicts of interest. A limited representation lawyer who acts negligently in handling any aspect of a matter for which he has undertaken responsibility will be liable in malpractice for damages proximately caused by the negligence.

The dilemma for opposing counsel

Limited scope representation raises potential ethical quandaries for opposing counsel. Is the opposing party to be treated as though she is represented or not? This can make a difference, for example, in whether counsel should treat the opposing party as unrepresented, for purposes of Rule 4.3, or as a represented person, requiring compliance with Rule 4.2. If the opposing party is considered unrepresented, Rule 4.3 prohibits the lawyer from presenting himself as disinterested or allowing the opposing party to think so, and from rendering legal advice to the opposing party. If the opposing party is treated as represented, under Rule 4.2 all communications must be through opposing counsel, not directly with the opposing party, unless opposing counsel consents to direct communications.

The prohibitions of Rule 4.2 arise only when a lawyer "knows" that the other party is represented by counsel. So if counsel doesn't know the opposing party has a behind-the-scenes lawyer, it is an easy question: Rule 4.2 does not apply. The difficulty comes when counsel knows there is a behind-the-scenes lawyer on the other side, but the limited scope lawyer's services do not include acting as an intermediary with opposing counsel. The better practice is, if counsel knows the identity of the limited scope counsel, to initially communicate with opposing counsel and seek clarification: Are you representing this person for

purposes of Rule 4.2 communications, or will you consent to me communicating directly with your client?

Can't have it both ways

Limited scope counsel can't have it both ways by prohibiting direct communications between opposing counsel and the client, yet refusing to fulfill a meaningful role in facilitating communications about the case. One of the things limited scope counsel must clarify with the client at the outset of the representation is counsel's role, if any, in inter-party communications.

In the unlikely event limited scope counsel will neither consent to direct communications nor act as a communications intermediary, counsel should be able to look upon the nature of the opposing party's formal appearance as the litmus test for whether a litigant is represented. An appearance constitutes formal notice of representation status in a court proceeding. Trial Rule 3.1. An unrepresented party is also required to file an appearance. Even with a disclosed behind-the-scenes lawyer, it seems to me that by filing an appearance as an unrepresented party that party would be estopped from insisting on the protections afforded by Rule 4.2.

Conclusion

As legal services become less affordable for many people, demand for limited scope legal representation will increase. These services may not be comprehensive, but they are clearly better than nothing. We need to adapt to this new paradigm. ⚖

The views expressed in this column do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.