Unbundling Legal Services: Limited Assistance Representation and Ghostwriting

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The high cost of private legal services has spurred demand for lawyers who are available to handle only a specified portion of a client's case rather than assuming responsibility – and charging the client – for the entire matter. This phenomenon received official imprimatur in 2019 with the adoption and implementation of Trial Court Rule XVI: the Uniform Rule on Limited Assistance Representation. That rule "permits an attorney to represent a party in a non-criminal action for discrete, limited purposes, if the limitation is reasonable under the circumstances and the client gives informed consent."

Limited Appearance Representation

The concept of limited assistance representation is known by many names, including unbundled legal services and limited scope representation, and represents a departure from full service representation. In general, limited assistance representation permits attorneys to assist a self-represented litigant on a limited basis in a civil case without undertaking full representation on all issues related to the legal matter for which the attorney is engaged.

Given that few civil litigants qualify for free legal services and many cannot afford full representation, recent years have witnessed a rise in the number of *pro se* litigants. In response, courts have studied and ultimately embraced limited assistance representation as a way of assisting litigants and expanding access to justice. With clear ethical and court rules, limited assistance representation can be an effective method of delivering legal services, and while it may not be practicable or appropriate in all cases or in all practice areas, it can provide benefits to clients, courts, and lawyers.

It is important to note that the concept and practice of limiting the scope of representation is not new at all in certain practice settings. Nor is the availability of limited assistance representation in Massachusetts necessarily limited to those courts and proceedings to which Trial Court Rule XVI applies.[1] The concept of limited assistance representation has been enshrined in the Massachusetts Rules of Professional Conduct since

[1] The "Trial Court" consists of the District Court, Boston Municipal Court, Housing Court, Juvenile Court, Land Court, Probate & Family Court, and Superior Court. However, by its terms, Trial Court Rule XVI does not apply to Juvenile Court proceedings unless and until it is adopted by the Juvenile Court. Lawyers practicing in juvenile proceedings are therefore cautioned to consult the applicable rules and orders of the Juvenile Court before undertaking any form of limited assistance representation in relation to that forum.

1998, with the adoption of Mass. R. Prof. C. 1.2(c). That rule provides that "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Therefore, provided that the limited nature of the representation is both reasonable and consented to, and does not otherwise violate the Rules of Professional Conduct, lawyers and clients are free to enter into limited assistance representation arrangements for legal services unrelated to a court case, such as transactional work or contract review. However, where the representation does involve a Massachusetts state court civil[2] proceeding, Trial Court Rule XVI applies and lawyers will be expected to comply with the provisions of that rule if they intend to provide limit the scope of their services or involvement in any way.

Under Trial Court Rule XVI(3), any attorney who wishes to practice limited assistance representation (referred to as "LAR" in the rule) must first complete a mandatory training and certification in order to qualify. Once the training is completed, the attorney must certify in writing that he or she has completed the training and submit the certification to the court.

Formal commencement of a limited assistance representation under Trial Court Rule XVI requires the filing of a Notice of Limited Appearance that "state[s] precisely the discrete event(s) and/ or discrete issue(s) for which the LAR attorney will represent the client." See Trial Court Rule XVI(4). This requirement accords with the lawyer's duties under the Rules of Professional Conduct, most notably Mass. R. Prof. C. 1.4(a)(2) ("a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished") and Mass. R. Prof. C. 1.5(b) (generally requiring a lawyer to use a written fee agreement that spells out "the scope of the representation").[3] It also makes practical sense: A client must clearly understand what part of the representation the attorney will be responsible for and what part of the representation the client will be responsible for in any given case. If a client doesn't understand how the work has been divided, limited assistance representation will not be successful. If the client's portion of the case is too complex for the client to fully understand, limited assistance representation is not appropriate, or fair to the

[2] By its terms, Trial Court Rule XVI does not apply to criminal cases.

[3] Since January 1, 2013, Mass. R. Prof. C. 1.5(b) has required written fee arrangements in all cases for which a fee is charged, with few exceptions. LAR in and of itself falls within the strictures of the rule, unless an exception applies. In *pro bono* cases, or in cases in which the anticipated fee will be under $500, a written fee agreement is not required; but the best practice would still be to have a writing clearly delineating the scope of the limited representation and confirming the client's informed consent.

client. An attorney must use experience and good judgment to determine whether the work can be practicably divided, and how to divide it in a manner well suited to accomplish the client's objectives.

The Notice of Limited Appearance form must be signed by both the lawyer and client, and thus goes a long way toward ensuring that that latter has consented to the limited nature of the representation, as required by both Trial Court Rule XVI and Mass. R. Prof. C. 1.2(c). However, under the Rules of Professional Conduct, and particularly the aforementioned Rule 1.2(c), mere *formal* consent is not enough. Rule 1.2(c) requires a lawyer to obtain the client's *informed* consent to the limited assistance representation. The requirement of "informed consent" is only met "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See Mass. R. Prof. C. 1.0(f) (definition of "informed consent"). In the context of LAR, this would seem to imply, at a minimum, that the lawyer explain to the client the risks of proceeding *pro se* on those aspects of the case that the lawyer is *not* being engaged to handle.

Under Trial Court Rule XVI, when the limited representation is completed, the attorney must file a Notice of Withdrawal of Limited Appearance, using a form prescribed by the court. There is no limit to the number of LAR agreements into which an attorney and a client may enter, but they must always be with the agreement of the client and, if required by Mass. R. Prof. C. 1.5(b), in writing. The attorney must file a Notice of Withdrawal for each new Notice of Limited Appearance.

An attorney who has filed a Notice of Limited Representation does not need the court's permission to withdraw once the limited representation has been completed. However, if the lawyer fails to file a Notice of Withdrawal of Limited Representation, the lawyer may be deemed to have entered a general appearance and will then need the court's permission to withdraw. See Trial Court Rule XVI(5). A lawyer filing a pleading, motion, or document outside the scope of the limited appearance may also be deemed to have entered a general appearance. See Trial Court Rule XVI(5). Whenever service is required or permitted upon a party represented by an attorney making a limited appearance, such service shall be upon the attorney and the party for all matters within the limited appearance. See Trial Court Rule XVI(6).

Ghostwriting

The Trial Court's rule on LAR includes a provision expressly permitting the practice of "ghostwriting" pleadings on behalf of a *pro se* litigant, provided that the lawyer's drafting is disclosed. Specifically, the rule provides:

> An attorney may assist a party in preparing a pleading, motion or any other document that the party will sign and file in court. In assisting the preparation of any such pleading, motion or other document, *the attorney shall insert the notation "prepared with assistance of counsel*." Assisting a party with this type of document preparation does not constitute a general or limited appearance of the attorney. The party remains responsible to the court and other parties for all statements in any pleading, motion, or other document prepared but not signed by an attorney.

Trial Court Rule XVI(9) (italics added).

The inclusion of this provision appears to settle what had historically been a somewhat controversial question in Massachusetts as to the ethical propriety of ghostwriting. In a 1971 opinion, the First Circuit Court of Appeals expressed serious concern that ghostwriting pleadings, rather than signing them as counsel, enabled lawyers to circumvent their obligations under Fed. R. Civ. P. 11. The court therefore declared flatly, "[i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him." Ellis v. State of Maine, 448 F.2d 1325, 1328 (1st Cir. 1971). Along those same lines, a 1998 MBA ethics opinion (MBA Op. 98-1) concluded that the practice of ghostwriting "litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited."

Resistance to ghostwriting began to crumble in the first decade of the 21st Century. An ABA ethics opinion in 2007 (ABA Op. 07-446) concluded that "there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to *pro se* litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct." As noted above, the Trial Court's Rule XVI(9) now expressly permits a lawyer to draft pleadings that will be filed by an otherwise *pro se* litigant, provided the document includes the notation "prepared with assistance of counsel." Moreover, according to the rule, this form of assistance "does not constitute either a general or a limited appearance of the attorney," and therefore does not trigger the procedural prerequisites of LAR set forth in Trial Court Rule XVI and discussed above.

Ghostwriting *does*, however, still constitute the practice of law. Therefore, a Massachusetts lawyer who agrees to prepare pleadings on behalf of client without entering an appearance in the client's case will still be required to comply with any and all ethical rules that would otherwise apply to the aspect of the case that the lawyer has agreed to undertake, such as competence (Mass. R. Prof. C. 1.1), diligence (Mass. R. Prof. C. 1.3), communication (Mass. R. Prof. C. 1.4), the requirement of a written fee agreement (Mass. R. Prof. C. 1.5), and avoiding conflicts of interest (Mass. R. Prof. C. 1.7).

As a final caveat on ghostwriting, it should be noted that the First Circuit to date has never retreated from its position in Ellis v. State of Maine, supra, that a lawyer who drafts a pleading is required by Rule 11 to sign it. Therefore, Massachusetts lawyers would be well advised to refrain from the practice of ghostwriting in federal court.

Conclusion

As the number of *pro se* litigants remains significant or expands, it will be a challenge for the courts and members of the bar to determine how to effectively assist litigants to ensure access to justice. The formal recognition of limited assistance representation appears to hold promise as a means of widening the availability of legal services to individuals who might otherwise not be able to afford them. However, lawyers must be aware that, even though Mass. R. Prof. C. 1.2(c) and Trial Court Rule XVI may permit a lawyer to limit the scope of a legal representation, the scope of the lawyer's ethical responsibilities to the client remains the same.