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LEGAL ETHICS

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"Unbundling:" A Hot-button Ethical Issue

California Joan looks at how to provide limited legal services as a lawyer scrivener

By ELLEN R. PECK

As California Joan was savoring her double mocha latte, the phone jarred her back to reality. It was Polly Person, a sole practitioner in Riverside who consulted with Cali from time to time about ethics issues which arose in her family law practice.

"Cali," Polly started, "I need to consult with you. In the 20 years I have been practicing family law, the conventional wisdom has been that dual representation of husband and wife in family law matters is ill advised and a dangerous malpractice trap!" (Hoogoboom & King, California Practice Guide (2000) Family Law, ch.1, p. 1-25.)

"Except in rare circumstances, I have followed that wisdom.

"Lately, more and more couples have requested that I jointly represent them in preparing marital settlement agreements or other agreements necessary to obtain their dissolutions in which they are representing themselves. Some of them cannot afford an attorney to handle the entire dissolution and some of them believe that they can agree amicably about terms regarding support obligations, child custody and visitation and property division mostly without lawyers." (Hoogoboom & King, California Practice Guide (2000) Family Law, supra, §1:80.)

"Unbundling of legal services has become such a big focus of the family law bench and bar in improving access to the courts that I thought I would add limited legal service areas to my practice," Polly continued.

"What the heck are 'unbundled legal services?'" Cali interjected.

Limited representation

"'Unbundling,' 'discrete task representation,' 'limited representation,' and 'partial representation' are interchangeable terms describing an agreement between an attorney and a prospective client that the scope of the legal services will be limited to the defined tasks upon which the prospective client and the attorney mutually agree.

"Generally, there are three types of unbundled or limited services offered: (1) advice and counsel; (2) limited court or administrative appearances; or (3) assistance with documents and pleadings." (Report on Limited Scope Legal Assistance with Preliminary Recommendations prepared by the Limited Representation Committee of the California Commission on Access to Justice, Oct. 2001, p. 2.)

“Well, gosh, I guess I have been offering unbundled services without knowing it. From time to time, I limit the scope of my legal services to some of my clients to certain tasks!” exclaimed Cali.

“Exactly,” continued Polly. “I would like to develop a new area of my practice: the limited representation of couples who have agreed upon the essential terms of a marital settlement agreement and need a lawyer to put the agreement into the proper legal form. But before I do, I need to explore the ethical and risk management issues involved.”

“The good news is that there is no California professional standard which prohibits lawyers from limiting the scope of their representation of clients. However, there are several forms of limited joint representation, each with slightly different ethical duties and risks:

“First, joint representation of both parties in an ‘uncontested dissolution’ provided you obtain the written consent after appropriate written disclosure of the potential conflicts. (Klemm v. Superior Ct. (1977) 75 Cal.App.3d 893, 900, 142 Cal.Rptr.509; Rule 3-310(C)(1) and (2), Rls. Prof. Cond.)

“Second, acting as an intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. (While California’s rules are silent on this type of representation, pursuant to rule 1-100(A), ABA Model Rule of Professional Conduct 2.2 may be consulted for guidance.)

“Third, you could act as a lawyer-scrivener. (Marriage of Egedi (2001) 88 Cal.App.4th 17, 105 Cal.Rptr.2d 518.)

“Let’s explore the ‘scrivener’ role more. Historically, when illiteracy rates were higher, lawyers often served as professional or public writers or scribes, wholly apart from providing legal services. (Restatement of the Law Third (2001) The Law Governing Lawyers, §72, comment c, p. 552.) Recent legislation has authorized non-lawyer document assistants to assist consumers in filling out legal forms (Bus. & Prof. Code, §§6400, et seq.)”

“Is a lawyer scrivener something different?” asked Polly.

“Well, I have yet to find a precise definition for a lawyer scrivener under California law. I have found only three published California opinions involving attorneys acting as scriveners.” (Marriage of Egedi, cited above; Blevin v. Mayfield (1961) 189 Cal. App.2d 649, 11 Cal.Rptr. 882; and Buehler v. Sbardellati (1995) 34 CalApp.4th 1527, 41 Cal.Rptr.2d 104.)

Marriage of Egedi arose out of a husband’s claim that a marital settlement agreement was unenforceable because the couple’s joint lawyer had a conflict of interest. Husband and Wife had filed a joint petition for dissolution of marriage in which they represented themselves. They had a short-term marriage with no children; the only issues were property division, debt allocation and spousal support.

They asked Lawyer to prepare a marital settlement agreement in the proper legal form after they had agreed to all of the essential terms. Lawyer, who had previously represented each in unrelated matters, at first refused.

At their continued insistence, Lawyer agreed to prepare it, after making a written disclosure and obtaining the written consent of both. (Id., 19-21.)

The Court reversed the trial court invalidation of the marital settlement agreement based upon the lawyer’s alleged conflict of interest because the trial court had found that: (1) there was no fraud, duress, undue influence or other inequity in the agreement; (2) the lawyer was acting in the role of a scrivener; (3) the lawyer’s disclosure was sufficient for the circumstances; and (4) the parties therefore gave their informed consent to the joint scrivener representation. (Id., at pp. 22-24.)

Blevin v. Mayfield was an action to cancel a deed from Decedent to Buyer, based in part on the alleged conflict of interest of the lawyer who prepared the deed transferring the property. Nine days before his death at 86, Decedent contacted Buyer and offered to sell her 80 acres of his land for \$5000. Decedent had close familial ties with Buyer, who had lived with him during her formative years and was a niece by marriage. He acknowledged that the value of the property was higher but said he wanted to give the property to her and her husband so that their farming operation would succeed.

Decedent repeated this to a personal friend, Mr. Koeln. Decedent then retained Lawyer to prepare the necessary documents to complete the transaction. At that time, Buyer was Lawyer's client and Lawyer had previously represented Decedent in much of his legal work. Prior to offering the documents to Decedent, who was accompanied by Mr. Koeln, for his signature to consummate the sale, Lawyer satisfied himself that Decedent was competent; that he was aware that the property value was higher than the consideration paid and that he still wanted to go through with the sale. (Id., at pp. 650-651.)

Scrivener services only

The Court upheld the transfer of the property and that there was no conflict of interest. The Court observed that agreement had already been reached between Decedent and Buyer when Lawyer was retained and therefore, Lawyer's only services were those of a scrivener. (Id., p. 652.)

Buehler v. Sbardellati arose out of a legal malpractice action in which the jury found that the lawyer was not negligent. Doctor, who was a sophisticated investor in real estate, determined to form a limited partnership (BD Ltd.) in which he would be a limited partner, with Parrish to purchase Apartment Complex in Texas. Doctor and Parrish retained Lawyer, telling him that they did not want him to make any decisions regarding the partnership agreement but just to ensure that the agreement was in conformance with California law.

Lawyer, whose firm represented both Doctor and Parrish individually in other matters, agreed to document the agreement in a written partnership agreement but said that if Doctor and Parrish became adverse, he could not represent them both or represent either one against the other. After obtaining their oral consent after oral disclosures (this was prior to the 1989 adoption of rule 3-310), Lawyer agreed to represent the partnership and documented the limited partnership in conformity with California law.

Prior to the completion of the purchase of Apartment Complex, Doctor agreed to sign a personal guarantee which he knew was in excess of his contribution as a limited partner to the partnership. BD Ltd. defaulted on its loan, the lender sued Doctor on his personal guarantee and Doctor was held liable for the full amount of BD Ltd.'s debt, more than \$700,000. (Id., 1533-1536.)

The Court held that there was no conflict of interest in Lawyer's representation of BD Ltd. concurrently with his representation of Doctor and Parrish in separate matters, where the scope of the representation was limited to memorializing the two clients' previous agreement under California limited partnership law. (Id., at pp. 1537-1540.) While the Court did not specifically label these services as those of a "scrivener," the description of the services implies that role.

"What's the difference between a lawyer scrivener and a lawyer who engages in joint representation of multiple parties?" asked Polly.

“An important joint representation case, *Lessing v. Gibbons* (1935) 6 Cal.App.2d 598, 599 45 P.2d 258, examined Entertainment Lawyer’s joint representation of motion picture actress Delores Del Rio and Director regarding an agreement with United Artists for production of Del Rio’s future movies and whether he had a conflict of interest precluding Del Rio’s payment of past due fees.

“The Court concluded that joint representation involved potential or actual conflicts of interest but that there is no prohibition of joint representation with full disclosure and consent of the parties, which the Court found to have occurred. (Id., pp. 605-606.)

“The Lessing Court described the factors commonly found in joint representation of multiple parties as follows:

“First, a common purpose or general objective mutually agreed upon by all of the parties to the joint representation. (Id., P. 604.)

“Second, the lawyer’s preparation of documents, representation or provision of legal services to effectuate the parties’ common purpose or objective. (Id., p. 605.)

“Third, legal advice to each party or the group as a whole necessary for their legal protection or necessary to make an informed and intelligent decision. (Id., pp. 605-606.)

“By contrast, the few cases that discuss lawyer scriveners suggest that the lawyer scrivener’s role involves:

“First, representation of two or more parties that not only have a common purpose, goal or objective, but also must have negotiated, without the lawyer, and agreed to all of the essential deal points or provisions of a transaction or venture. (*Marriage of Egedi*, supra, at p. 20-21, 24; *Blevin v. Mayfield*, supra, 189 Cal.App.2d at pp. 650-651; *Buehler v. Sbardellati*, supra, 34 CalApp.4th at pp.1533-1536.)

“Second, the scope of the lawyer’s engagement by the client and the services provided is limited to giving legal structure to the agreement previously reached. (*Marriage of Egedi*, supra, at p.20-21, 24; *Blevin v. Mayfield*, supra, at pp. 650-651 ; *Buehler v. Sbardellati*, supra, at pp.1533-1536.)

“Third, the lawyer does not negotiate or facilitate agreement between the parties and does not give legal advice about the pros and cons of the deal points or the agreement to the clients, because that would defeat the very purpose for which the parties sought the lawyer’s services as scrivener. (*Marriage of Egedi*, supra, at p. 24.) In situations where the parties’ agreement is so grossly unfair or against public policy, the attorney should decline to act as a scrivener. (Id., at fn. 5.)

“Fourth, if one of the parties seeks to obtain counsel separately or discuss the matter separately, the lawyer scrivener should decline the contact,” Cali finished. (Id., at p. 20; *Blevin v. Mayfield*, supra, at pp. 650-651; *Buehler v. Sbardellati*, supra, at pp.1533-1536.)

“Whoops! Cali, I have to go to a court hearing. Can we continue this discussion?” Polly asked.

“Sure,” responded Cali. “In our next conference, we’ll discuss the ethical principles in implementing limited legal services as a lawyer scrivener.”

Next Month

Part Two will discuss the ethical principles and risk management tips in implementing limited legal services as a lawyer scrivener.

© 2001 and 2002. All rights reserved by Ellen R. Peck. A sole practitioner in Escondido, Peck limits her practice to lawyer law and lawyer professional responsibilities and ethics. She is a co-author of the “The Rutter Group California Practice Guide — Professional Responsibility” and a visiting professor on professional responsibility at Concord University School of Law.

Test — Legal Ethics

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. Dual representation of husband and wife can be a dangerous malpractice trap.
2. True/False. Requests for joint representation in family law matters are very rare.
3. True/False. Unbundling and discrete task representation are different types of legal services related to family law only.
4. True/False. Lana Lawyer wants to provide limited services in immigration law. One type of limited service she could offer is legal assistance with completing documents and forms to be filed with the INS.
5. True/False. California professional standards prohibit lawyers from providing limited legal services to clients.
6. True/False. Husband and wife request that Lawyer assist them in preparing a jointly filed marital settlement agreement. May Lawyer accept the engagement if he obtains their written consent after appropriate written disclosure of any potential conflicts?
7. True/False. The lawyer acting as an intermediary is expressly permitted by the California Rules of Professional Conduct.
8. True/False. One of the roles of an intermediary is to seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis.
9. True/False. A lawyer is not permitted to act as a scrivener because of the conflicts of interest in representing two parties.
10. True/False. In the past, when illiteracy rates were higher, lawyers frequently provided scrivener services without performing legal services.
11. True/False. A non-lawyer is not permitted to assist consumers in filling out legal forms because such conduct constitutes the unauthorized practice of law.
12. True/False. California law defines precisely what a lawyer scrivener is.
13. True/False. A marital settlement agreement, entered into without fraud, duress, undue influence or other inequity, which was prepared by a lawyer scrivener who obtained the informed written consent of his clients to the representation, will not be held unenforceable.

14. True/False. The preparation of documentation for the sale and transfer of real property between seller and buyer will be subject to future cancellation of deed where the documentation was prepared by a lawyer scrivener after buyer and seller had agreed on essential terms.
15. True/False. Lawyer was retained to act as a scrivener to document the agreement by two parties to enter into a California limited partnership to purchase real estate. Lawyer may represent the partnership or may represent the interests of the two limited parties jointly.
16. True/False. There is no difference between a lawyer scrivener and a lawyer who engages in joint representation of multiple parties.
17. True/False. Both joint representation and the lawyer scrivener role involve the representation of multiple parties for a common purpose and the provision of legal services to effectuate the parties' common purpose or objective.
18. True/False. A lawyer scrivener should neither negotiate nor facilitate agreement between the parties nor give legal advice about the pros and cons of the deal points or the agreement to the clients.
19. True/False. Lawyer agreed to serve as a scrivener and draft a marital settlement agreement for Husband and Wife, after they agreed upon the terms. Upon reading the terms, attorney believes reasonably that the terms are grossly unfair to wife. Lawyer may not then decline to act as a scrivener.
20. True/False. Lawyer agreed to act as a scrivener, after obtaining Husband's and Wife's informed written consent, to put their agreement into appropriate legal form of a marital settlement agreement. After Husband received the draft agreement, he telephoned Lawyer and requested that Lawyer advise him about how the agreement affected him personally. Lawyer, appropriately, refused to talk with him.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which 1 hour will apply to Legal Ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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1 HOUR CREDIT

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