

**REPORT OF THE UNBUNDLED
LEGAL SERVICES
SPECIAL COMMITTEE II**

Date: July 26, 2002

INTRODUCTION

On March 13, 2002, the Supreme Court of Florida requested that The Florida Bar propose amendments to the Rules of Professional Responsibility and the Family Law Rules of Procedure to address the issue of a lawyer engaging in limited representation (also referred to as discrete representation or unbundled legal services) both out of court and within the context of a family law proceeding in court. Specifically, the Court asked The Florida Bar to propose amendments to the Rules of Professional Responsibility to codify Professional Ethics Committee Opinion 79-7 regarding limited out-of-court representation and to propose amendments to the Family Law Rules of Procedure to address limited in-court representation in family law matters. The letter from the Court is attached hereto in Appendix A.

As a result of the Court's request, President Terrence Russell appointed the Unbundled Legal Services Special Committee II (hereinafter "the Committee"). Members of the Committee are Adele I. Stone, Chair, Michele Kane Cummings, The Honorable Lisa Davidson, Sally D. M. Kest, Sharon Langer, Gary S. Lesser, Denise A. Lyn, Kenneth L. Mann, Lewis R. Shafer and Jeffrey P. Wasserman. The members have served or are serving on the Professional Ethics Committee, the Young Lawyer's Division of The Florida Bar, the Board of Governors of The Florida Bar, the Family Law Section of The Florida Bar, the Family Court Steering Committee and other bar sections and committees. They were chosen for their experience and knowledge in the areas of

ethics and family law. What follows is the report of the Committee and the proposed amendments to the Rules Regulating The Florida Bar and the Family Law Rules of Procedure.

BACKGROUND AND HISTORY

On February 28, 2000, the Supreme Court of Florida ordered The Florida Bar to study the possible need for unbundled legal services. Then President Herman Russomanno appointed a committee to study the issue and report back to the Court.

On October 4, 2001, the first Unbundled Legal Services Committee filed its report with the Court. The first committee did not recommend any rule amendments. The conclusions and recommendations from the first Committee were as follows:

1) This Committee did not independently investigate the need for “limited representation” in family law matters, but relied on the investigation done by the Family Law Section. The Committee accepts their recommendation that there is a need for “limited representation” in family law matters.

2) The Committee received no other information from other sections or committees as to the need for “limited representation” in other areas of practice. The Committee, therefore concluded none is warranted at this time.

3) No amendment to the Rules Regulating The Florida Bar is required to facilitate “limited representation” as presented in Proposed Family Law Rule 12.040.

4) The implication of Rule 4-3.3, concerning candor toward the tribunal, as it

applies to the attorney notification requirement in Proposed Family Law Rule 12.040(d), should be addressed by the Court.

5) The Committee recommends that the Court refer the matter to the Family Law Rules Committee with a request that the committee draft a rule that specifically addresses limited representation in court.

Thereafter, the Court sent the letter which prompted the formation of the second committee. Although the first committee was asked to assess the need for unbundled legal services, this task was not assigned to the second committee. The second committee was assigned the task of drafting proposed rule language. Therefore, this Committee did not study the need for unbundled legal services.

ACTIONS OF THE COMMITTEE

The Committee held all meetings by conference call. The first meeting was held on April 30, 2002. At that time, two subcommittees were formed; one to review the ethics rules and one to review the family law rules. Each subcommittee met several times by conference call and draft rules were circulated and discussed. The rules were then circulated among the entire Committee for approval.

Among the rules which the Committee discussed were rules being proposed in Washington state. The Washington rules are more comprehensive than the rules this Committee is proposing as they would apply to all types of proceedings. However, the Committee did adopt some of the Washington language limiting it to family law matters.

Once the Committee approved the rules, a copy was provided to the following interested groups:

- Family Law Rules Committee
- Civil Procedure Rules Committee
- Small Claims Rules Committee
- Professional Ethics Committee
- Family Law Section
- Trial Lawyers Section
- Young Lawyers Division of The Florida Bar
- Family Court Steering Committee
- Conference of County Court Judges
- Florida Chapter of Matrimonial Lawyers
- Florida Probate Rules Committee

Most of the groups considered the rules proposed by the Committee at the annual convention of The Florida Bar in June, 2002. When possible, a member of the Committee addressed an interested group and answered questions. Input from the groups was voted on and where approved by the Committee is incorporated in the proposed rules approved by the Committee. The proposed rules were also published in the July 15, 2002, issue of *The Florida Bar News*. The rules which are attached to this report as the final recommendation of the Committee differ in some respects from the rules that

were published. The fact that the rules were in draft form and subject to change was included in the notice.

Amendments are being proposed to Rules 4-1.2, 4-4.2 and 4-4.3. The Committee felt that these were the only Rules of Professional Conduct that needed to be changed. Concerns of the first committee regarding Rule 4-3.3 are addressed in the proposed comments to Rule 4-1.2. The Committee is also proposing a new rule, 12.040, to be included in the Family Law Rules of Procedure.

The Committee takes note of the fact that Rule 2.060 of the Florida Rules of Judicial Administration should be amended in order to avoid a conflict with the changes to the rules and the new family law rule proposed by this report.

INPUT FROM OTHER COMMITTEE, SECTIONS AND GROUPS

As noted above, the proposed rules were circulated to various groups and input was received. Written comments are included in Appendix B. The following are summaries of the comments from the various groups:

Family Law Rules Committee and Family Law Section

The Family Law Rules Committee supported proposed rule 12.040 and the proposed amendments to Rules 4-4.2 and 4-4.3. As to the proposed amendments to Rule 4-1.2, the Family Law Rules Committee suggested that the client consent in writing and that the words “pro se” be deleted from a line in the comment. As will be more fully discussed below, these changes were made by the Committee.

Civil Procedure Rules Committee

The rules were discussed but no comments were made.

Small Claims Rules Committee

The Small Claims Rules Committee had concerns over how limited representation would be put into practice and voted not to support any changes to the existing rules or the addition of Rule 12.040.

Professional Ethics Committee

The Professional Ethics Committee (PEC) took no formal action but had several comments. First, the PEC found that nothing in the Rules of Professional Conduct would conflict with the proposed rules or would prohibit limited appearance. Several members thought that the client consent should be in writing. One member felt that Rule 4-1.2 should read “unless prohibited by law or rule” instead of “if otherwise permitted by law or rule.” As will be more fully discussed below, these changes were made by the Committee.

Trial Lawyers Section

The Executive Council of the Trial Lawyers Section voted to take a position against the proposed changes. The Executive Council did request that it be stated in the proposed amendments to the Rules of Professional Conduct that the rules are limited to family law matters. This request was rejected by a vote of 5 to 3 of this Committee as the Rules of Professional Conduct are rules of general application.

Young Lawyers Division of The Florida Bar

The Young Lawyers Division voted to not support either the family law rule or the changes to the Rules of Professional Conduct. However, the Division also stated that if the Court still wanted the rules, the consent should be in writing.

Family Court Steering Committee

The Family Court Steering Committee supported the concept of unbundled legal services. No comments were received as to the specific language of the rules.

Conference of Circuit Court Judges

The Conference of Circuit Court Judges is in agreement with the rules.

Florida Chapter of Matrimonial Lawyers

No comments were received from this group.

Florida Probate Rules Committee

The Probate Rules Committee voted to not oppose the rules.

DISCUSSION OF PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT 4-1.2, 4-4.2 & 4-4.3 AND PROPOSED NEW RULE 12.040 OF THE FAMILY LAW RULES OF PROCEDURE

Rule 4-1.2 – Objective and Scope of Representation

The first Unbundled Committee concluded that Rule 4-1.2 already allowed limited representation, and therefore, no changes were necessary. However, since the Court requested changes, this Committee modified the rule to clarify that limited representation is allowed. The amendment limits the scope of the rule to instances where limited

representation is not prohibited by law or rule. As requested by the Court, language from Professional Ethics Opinion 79-7 has been added to the comment. The comment language makes it clear that the limitation must be reasonable, gives examples of permissible limitations and clarifies that an attorney-client relationship is formed under a limited representation thereby invoking all of the ethical obligations and duties imposed by the Rules Regulating The Florida Bar. The comment of the rule also points out that all of the rules, including the rules regarding communication with represented persons, apply.

The proposed amendments also require that the client consent to the limited representation in writing. The amendments first proposed by the Committee and circulated to the various groups stated that the consent *preferably* be in writing. Several comments suggested that the word “preferably” be omitted. This suggestion, along with the others, was circulated to the Committee. The Committee voted 5 in favor and 3 opposed to deleting “preferably” thereby requiring that the consent be in writing. Therefore, the final proposal omits “preferably” thereby requiring the consent be in writing. A copy of the proposed rule is attached hereto in Appendix C.

Rule 4-4.2 – Communication With Persons Represented By Counsel

The Committee felt that Rule 4-4.2 needed to be amended to address limited representation. The amendment to Rule 4-4.2 specifies when a person is considered to be unrepresented in the context of limited representation and clarifies when the opposing

lawyer may and may not communicate with the person directly. The person is considered to be unrepresented unless opposing counsel has received a written notice of appearance or a written notice setting forth the time period during which opposing counsel is to communicate with the limited representation lawyer about the matters within the scope of the representation. The language is adapted from the rule from Washington state. A copy of the proposed rule is attached hereto in Appendix D.

Rule 4-4.3 – Dealing With Unrepresented Persons

The amendment to Rule 4-4.3 is identical to the amendment to Rule 4-4.2. A copy of the proposed rule is attached hereto in Appendix E.

Rule 12.040 of the Family Law Rules of Procedure

This amendment creates a new rule **in family law cases only**. A copy of the proposed rule is attached hereto in Appendix F. The various subsections provide as follows:

Subsection (a) allows an attorney to be attorney of record for only part of the proceeding thereby permitting limited in-court representation.

Subsection (b) requires the court's permission to withdraw where 1) the attorney originally signed up for the entire case and wishes to cease representation before the case is over; 2) the attorney originally signed up for the entire case and wishes to withdraw from part of the case before the case is over thereby limiting the appearance to part of the case only; and 3) the attorney is already appearing on a limited basis and wishes to

withdraw from the case before the limited representation is over.

Subsection (c) specifies that the attorney who appears of record in a limited proceeding or matter does not need the permission of the court to end the representation when the representation is over. The rule requires the attorney to file a notice of completion titled “Termination of Limited Appearance.”

Subsection (d) comports with the requirements of Professional Ethics Opinion 79-7 and specifies that if the attorney assists a pro se litigant in the preparation of pleadings or other documents only, the pro se litigant must certify on the pleading or document that an attorney assisted. The name of the attorney need not be given but the party’s name must appear on the pleading or document.

Subsection (e) requires the limited appearance attorney to note in bold type on the signature page of the pleading or other document “Attorney for [Petitioner] [Respondent] [address of Petitioner or Respondent] for the limited purpose of [matter or proceeding]” in order to clarify the scope of the appearance for the court and the parties.

Subsection (f) requires that during the time the attorney is making a limited appearance pleadings or other documents must be served on both the attorney and the party. Once, the attorney’s limited appearance is over, service on the attorney is no longer required.

RECOMMENDATIONS

The Unbundled Legal Services Special Committee II recommends that the Board

of Governors of The Florida Bar forward the Committee's report to the Supreme Court of Florida. The Committee also recommends that if the proposed amendments and the new rule are adopted, the Court amend Rule 2.060 of the Florida Rules of Judicial Administration in order to eliminate a conflict between that rule and the rules which may be adopted pursuant to this report.

Respectfully submitted,

Adele I. Stone, Chair
Unbundled Legal Services Special Committee II

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. ~~A~~ If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents in writing after consultation. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) Limitation on Lawyer's Conduct. When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or by law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope Objectives of representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 4-1.14.

Independence from client's views or activities

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token representing a client does not constitute approval of the client's views or activities.

Services limited in objectives, scope or means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent, or which the client regards as financially impractical.

Although this rule affords the lawyer and client substantial latitude to limit the representation if not prohibited by law or rule, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, a lawyer and client may agree that the representation will be

limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses. If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate “Prepared with the assistance of counsel” on the document to avoid misleading the court that otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer. If not prohibited by law or rule, a lawyer and client may agree that any representation in court be limited. For example, a lawyer and client may agree that the lawyer will represent the client at a hearing regarding child support and not at the final hearing or in any other hearings.

Regardless of the circumstances, a lawyer providing limited representation forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality and avoidance of conflicts of interest. Although an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and law. Thus, the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, fraudulent, and prohibited transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by rule 4-1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Subdivision (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Subdivision (d) does not preclude undertaking a criminal defense incident to a general retainer for legal

services to a lawful enterprise. The last sentence of subdivision (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with the rule on objectives and scope of representation is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer

representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for 1 party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with the rule on objectives and scope of representation is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

12.040. ATTORNEYS

(a) **Limited Appearance.** An attorney of record for a party, in a family law matter governed by these rules, shall be the attorney of record throughout the same family law matter, unless at the time of appearance the attorney files a notice, signed by the party, specifically limiting the attorney's appearance only to the particular proceeding or matter in which the attorney appears.

(b) **Withdrawal or Limiting Appearance.**

(1) Prior to the completion of a family law matter or prior to the completion of a limited appearance, an attorney of record, with approval of the court, may withdraw or partially withdraw, thereby limiting the scope of the attorney's original appearance to a particular proceeding or matter. A motion setting forth the reasons must be filed with the court and served upon the client and interested persons.

(2) The attorney shall remain attorney of record until such time as the court enters an order, except as set forth in paragraph (c) below.

(c) **Scope of Representation.** If an attorney appears "of record" for a particular limited proceeding or matter, as provided by this rule, that attorney shall be deemed "of record" for only that particular proceeding or matter. At the conclusion of

such proceeding or matter, the attorney's role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance. The notice, which shall be titled "Termination of Limited Appearance," shall include the names and last known addresses of the person(s) represented by the withdrawing attorney.

(d) **Preparation of Pleadings or Other Documents.** A party who files a pleading or other document of record pro se with the assistance of an attorney shall certify that the party has received assistance from an attorney in the preparation of the pleading or other document. The name, address and phone number of the party shall appear on all pleadings or other documents filed with the court.

(e) **Notice of Limited Appearance.** Any pleading or other document filed by a limited appearance attorney shall state in bold type on the signature page of that pleading or other document: "Attorney for [Petitioner][Respondent] [address of Petitioner or Respondent] for the limited purpose of [matter or proceeding]."

(f) **Service.** During the attorney's limited appearance, service of pleadings or other documents related to that matter shall be served upon both the attorney and the party.