

Unbundling in the 21st Century: *How to Reduce Malpractice Exposure While Meeting Client Needs*

By Beverly Michaelis

Providing limited legal services is not a new concept. Transactional lawyers have long served in the role of document reviewer or preparer. So how is unbundling different? It takes the idea one step further by employing a team approach in which the lawyer and client decide who will do what based on the legal services required by the client's case. The client takes a much more active role in the matter and often assumes responsibility for *pro se* court filings and appearances. Add the 21st century twist of delivering unbundled services online, and some issues arise.

Ethics Revisited

Limited-scope representation is expressly permitted in Oregon so long as "the limitation is reasonable under the circumstances and the client gives informed consent." Oregon Rule of Professional Conduct 1.2(b). Whether unbundled services are reasonable under the circumstances will require your professional judgment. For a complete discussion of the ethical implications in providing unbundled services, including restrictions on ghostwriting or scripting specific messages for clients engaged in settlement negotiations, see Helen Hierschbiel's Bar Counsel column, "The Ethics of Unbundling: How to Avoid the Land Mines of "Discrete Task Representation," *OSB Bulletin* (July 2007).

To Unbundle or Not to Unbundle

The benefits of a team approach to representation make unbundling attractive: more affordable legal services, greater access to justice, empowered clients, new revenue streams for lawyers, greater flexibility in providing legal services and improved public perception of the legal system. But what about the risks? If the client fails to follow through with a crucial step in the case, can you be held accountable? Is the malpractice exposure inherently greater when services are unbundled? There is no bright-line answer, but you can *manage* the risks and reduce the potential for malpractice by taking a few simple precautions.

Screening Is the Key

To serve clients and minimize malpractice exposure, screen clients and cases carefully. Start by evaluating the client:

- Does the client have the mental, emotional and physical capacity to carry out his or her portion of the legal work?
- Does the client have the funds to proceed?
- Does the client understand that "uncontested" does not necessarily mean "quick" or "simple"?
- Are the client's expectations reasonable, given the likely outcome or range of outcomes?
- What is the client's experience with the legal system? Positive? Negative?
- If the case requires the client to appear in court *pro se*, is he or she likely to feel overwhelmed?

- What is the relative distribution of power between the parties? Does the other side have a potentially unfair advantage?
- How do you feel about your client? Is he or she someone you can work with easily? Do you have good rapport? Try to gauge whether the client will abide by a limited representation agreement or attempt to draw you back into the case when your portion of the work is complete.
- Even when the client is a good candidate for unbundling, the client's case may not be. Consider:
 - Can the representation be broken down into discrete steps that can be easily divided between lawyer and client?
 - Is there an absence of complex legal issues? (e.g., no disputes over custody, parenting time or property division in a marital dissolution)
 - Have all the parties been identified?
 - Is there any reason to believe that the other side will be difficult to locate and serve?
 - Is there a critical deadline looming? If legal services are divided and the client is responsible for meeting the deadline, is the client able and likely to follow through on a timely basis?
 - Have you had (or will you have) the opportunity to verify the client's facts? If not, does the client fully understand the consequences of proceeding without your verification?
 - If the unbundling arrangement will require a limited court appearance on your part, will you be able to withdraw afterward? Note that courts are not bound by limited representation agreements and may not grant permission to withdraw.

Are You Suited to Unbundling?

Competence is a basic requirement for providing any legal service, but unbundling comes with some additional challenges. Are you up to the task of training and coaching *pro se* clients? Can you be sufficiently assertive? Are you willing to ask the right questions and elicit the facts? Can you effectively divide the work to be done? Can you say "no" when appropriate? Do you understand the malpractice risks? Are you prepared to do involuntary *pro bono* if the court will not permit withdrawal? Asking yourself these questions will help you evaluate whether unbundling is a good match for you.

Avoid the Traps

The following are frequent causes of legal malpractice claims and can be of particular concern when delivering unbundled services:

- Failure to define or document the scope of engagement.
- Lack of informed consent. (Some clients will sign anything; it is your responsibility to make sure the client understands the situation.)
- Unrealistic client expectations.
- Poor communication with the client.
- Lack of documentation (e.g., memos to the file, confirming letters or e-mails).
- Undetected conflicts of interest; inadequate or nonexistent conflict systems.
- Failure to ask the right questions or verify the client's facts, resulting in a missed deadline or missed point of law.
- Dabbling in an unfamiliar area of law.
- Failure to effectively disengage and withdraw as attorney of record.

To minimize scope-of-engagement and informed consent problems, prepare a carefully worded engagement letter outlining what you will and will not do. Adequately disclose how difficult the client's portion of the work will be, keeping the language of the letter as simple as possible.

Consider developing a checklist of tasks and responsibilities that clearly identifies who is responsible for what (and when).

If you are helping the client with a summary marital dissolution, define what a summary marital dissolution is or prepare a separate information sheet for the client. The summary dissolution information published by the Oregon State Bar Lawyer Referral Service is an excellent starting point. (From the OSB home page, www.osbar.org, choose Lawyer Referral Service under the Client Services heading, then select the Do It Yourself Legal Info link.)

The final document should be easy to read, making ample use of large fonts, bulleted lists, bold type, all caps, colored fonts and any other formatting device to draw the client's attention to important provisions. It may be beneficial to have the clients initial key paragraphs in the body of the letter, in addition to signing the agreement on the last page.

In general, avoid having clients sign on the spot. Give them an opportunity to take your engagement letter home, review it thoroughly, and call with any questions. This will protect you against later claims of duress or lack of informed consent.

If the client is not able to follow through with *pro se* filings or court appearances and you agree to finish the case for the client, require the client to sign a *new* fee agreement/engagement letter.

Finally, if your unbundled service agreement specifies that your fee is "earned upon receipt" or permits payment of fees via credit card, carefully read OSB Formal Opinion Nos. 2005-151 and 2005-172. (From the OSB home page, www.osbar.org, select Ethics Opinions under the Member Resources heading.)

How to Document Your File Effectively

The need to document your file increases exponentially at certain stages of the case — when the client is acting against your recommendation, when client consent must be confirmed or when the client is responsible for the next crucial step in the case.

Documentation is also important at the end of the matter. When your work is concluded, send the client a disengagement letter. Make clear that the representation is over, identify any remaining work to be done, explain the consequences if the client fails to follow through, and inform the client of any impending deadlines. This is also an appropriate time to return original client documents and send a final billing statement, if necessary. Use a file closing checklist and follow the same procedures you would use if the case were not unbundled. If you appeared in court on the client's behalf and need to withdraw as attorney of record, comply with applicable court and ethics rules.

Some clients who seek and accept unbundled services may want you to do more than the agreed-upon amount of work. It may be necessary to send one or more follow-up letters to document that you are no longer the client's lawyer and your responsibility for the matter has ended.

Resources for Streamlining the Process

The process of effectively engaging, disengaging, documenting and screening both cases and clients can seem overwhelming. However, almost all these steps can be streamlined by developing form letters and other tools that can be reused with each new client. The OSB's *Fee Agreement Compendium* and the ABA Law Practice Management Section's *Letters for Lawyers*

are useful resources. The latter can be purchased online at a discount through the Professional Liability Fund at www.osbplf.org. Select ABA Products under the Loss Prevention heading. Sample forms, including engagement, disengagement and nonengagement letters; memos to the file; and a file closing checklist are also available on the PLF website. From the PLF home page, select Practice Aids and Forms under the Loss Prevention heading. The ABA Standing Committee on The Delivery of Legal Services has a must-visit website: www.abanet.org/legalservices/delivery/delunbund.html. While you are there, download *Unbundling 101: Expanding Your Practice Using Limited Scope Representation*, which includes sample forms and checklists.

The 21st Century Twist: Online Delivery of Unbundled Services

Screening Clients Just Got Harder

In a virtual or online practice, clients are unseen. You will need to invest extra effort to build rapport and gauge the likely success of your working relationship via e-mail or online contacts. If you intend to practice virtually, checklists, tip sheets and interview forms crafted around traditional screening criteria will be crucial to your success. Review the resources listed at the end of this article and visit the sites of successful and respected virtual practitioners, such as Stephanie Kimbro, www.kimbrolaw.com.

The Bona Fide Office Rule

Oregon has no “bona fide office rule,” requiring a brick-and-mortar office space to conduct a law practice. If you practice in other states, the rules may be different. At least one jurisdiction (New Jersey) has determined that virtual offices do not meet that state’s bona fide office requirement. See <http://new.abanet.org/sitetation/Lists/Posts/Post.aspx?ID=626>.

With that said, the same considerations discussed above apply to online delivery of legal services. In addition, any virtual law office must address:

- Marketing restrictions.
- Full disclosure of the jurisdictional limits of practice.
- Client confidentiality: Any online portal that permits communication, collaboration or document exchange with clients must be secure.
- Publication of terms and conditions identifying when an attorney-client relationship is formed.
- See Helen Hirschbiel, “Internet Marketing: Rules of the Road,” *OSB Bulletin* (January 2008) for more information regarding online marketing and jurisdictional disclosure.

Online Practice and Lawyer Referral

Would a lawyer practicing virtually be eligible to receive referrals from Oregon’s LRS, absent a physical office? The answer is no. Clients referred by the LRS are specifically told to expect an “in-office” consultation. See also LRS Policies and Procedures E.(3):

No duplicate registrations shall be made outside of the city where the attorney maintains his or her practice unless: a) the attorney maintains a second physical location where attorney-client meetings may take place; or b) the attorney’s office is located within two (2) miles of the border between two locations.

Online Practice and PLF Coverage

Only an Oregon attorney engaged in the private practice of law whose principal office is in Oregon is covered by the PLF Claims Made Plan. ORS 9.080(2). But what if the attorney has no office in which he or she meets with clients? PLF Policy 3.180(C) provides:

If an attorney has no office as defined in subsection (B) above, the attorney's principal office as defined by ORS 9.080 (2)(a) will be defined as the attorney's principal residence if the attorney is an active member of the bar association of the state of residence; otherwise, the attorney's principal office will be deemed to be in Oregon unless the attorney affirmatively demonstrates to the PLF that the attorney does not engage in the private practice of law in Oregon.

PLF Policy 3.180 is available on the PLF website at www.osbplf.org. Select Policies and Forms under the Primary Coverage heading. If you have questions regarding PLF coverage, call Jeff Crawford or Kimi Nam at (503) 639-6911 or (800) 452-1639.

Resources for Online Delivery of Unbundled Services

For additional information regarding virtual office practice, visit the ABA eLawyering Task Force online at www.abanet.org/dch/committee.cfm?com=EP024500. Vendors of online platforms for virtual offices include Virtual Law Office Technology, www.vlotech.com/, and Direct Law, www.directlaw.com/. [Author's note: see <http://oregonlawpracticemanagement.wordpress.com/2010/09/07/sneak-preview-virtual-practice-in-oregon/> for additional resources not included in the original print version of this article.]

Conclusion

If you are a brick-and-mortar lawyer, the potential traps of providing unbundled legal services are well known. If you are one of the pioneers providing legal services online, the roadmap is a work in progress. Stay tuned.

ABOUT THE AUTHOR

The author is a lawyer and practice management advisor with the Professional Liability Fund.

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