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Limited Representation: Helping Clients While Protecting Yourself

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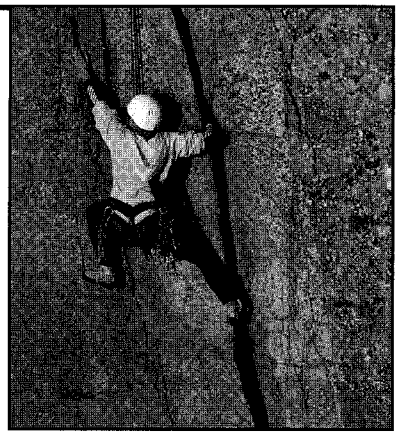

Limited Representation: Helping Clients While Protecting Yourself

by Mary E. Berkheiser, Esq.

The scenario

A potential client walks into a lawyer's office. He tells the lawyer that he wants to file a worker's compensation claim against his company for a back injury that he suffered on the job. She is not a worker's compensation lawyer, but wants to help him, so she agrees to file the application for him and refer him to a lawyer who specializes in workers compensation law to handle the claim. She files the claim; he consults and retains the other lawyer. All's well. Or is it?

The rule

Is the lawyer's responsibility limited to filing the worker's compensation claim for the injured worker, or must she do more? The answer, of course, is: "It depends." The lawyer-client relationship is defined by what the client retains the lawyer to do, and that retention may be as general or specific as the lawyer and client desire.[1] The Nevada Supreme Court has recognized that even with regard to "a particular transaction or dispute, an attorney may be specifically employed in a limited capacity."[2] This freedom to contract for broader or narrower representation benefits both lawyers and clients. No lawyer can be a true generalist anymore, and most clients cannot afford the full range of representation that the legal profession offers on a single matter.

However, rules governing professional conduct suggest that a lawyer who wishes to limit her representation of a particular client in a particular case should follow certain guidelines that are designed to protect both the client and the lawyer. Under Nevada Supreme Court Rule 152(3), a "lawyer may limit the objectives of the representation." But Rule152(3) goes on to state an important caveat: limited representation may occur *only* "if the client consents after consultation" with the lawyer. As defined by the ABA Model Rules of Professional Conduct (Model Rules)[3], "consultation" means "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."[4]

What must our hypothetical lawyer do to satisfy her professional obligations? As with most questions concerning what the law requires, the best guidance may come from those who have run afoul of it. Two unhappy lawyers were California practitioners who had the misfortune of not fully appreciating their professional responsibilities when they undertook to help a client with what looked like a simple worker's compensation claim.[5]

The sad story

The injured worker in this sad story approached Lawyer A after suffering a serious blow to the head from a careening piece of steel while at work as a welder on a construction site in Crow's Landing, California. Lawyer A had the client sign a worker's compensation application for adjudication of his claim, executed the form as "applicant's attorney" and filed it with the appropriate state agency. Lawyer A then associated Lawyer B to prosecute the worker's compensation claim. More than a year later, a union employee suggested that the worker consult with another lawyer. He did and, in his words, "At this meeting, I learned for the first time that a third-party claim could and very likely should have been brought."[6] The statute of limitations had run, so the worker was out of luck. His legal malpractice action against Lawyers A and B soon followed.[7]

The appellate court held that both Lawyer A and Lawyer B had "a duty of care to advise on available remedies, including third-party actions,"[8] even though it was undisputed that both lawyers thought they had undertaken to provide the worker only limited representation in the worker's compensation arena, and reversed the lower court's entry of summary judgment in the lawyers' favor.

The court reasoned that one of a lawyer's "basic functions is to advise. Liability can exist because a lawyer failed to provide advice. Not only should a lawyer furnish advice when requested, but he or she should volunteer opinions when necessary to further the client's objectives."[9]

Even when representation is expressly limited, a lawyer still has a duty "to alert the client to legal problems which are reasonably apparent, even though they may fall outside the scope of the retention."[10] Thus, the court concluded that although a worker's compensation lawyer may limit representation to the compensation claim, the lawyer must both caution the client about other remedies that may be available and advise the client to consult other counsel on those matters.[11]

The lesson

The Preamble to the Model Rules states explicitly that the rules do not provide a basis for civil liability; instead, they are designed to "provide guidance to lawyers."[12] If Lawyer A and Lawyer B had followed the guidance of Rule 1.2(c),[13] the Model Rules counterpart to Nevada Supreme Court Rule 152(3), they could have avoided all the difficulties that ensued.

These lawyers went awry by failing to "consult" with their client in order to obtain his consent to the limited representation. To meet the "consultation" requirement of Model Rule 1.2(c), they needed to take steps to communicate sufficiently with their client so that he could "appreciate the significance" of the fact that they would be representing him on the worker's compensation claim only. At the time the worker consulted the attorneys, he certainly did not know that he might have a claim other than for worker's compensation. He had no way to "appreciate the significance" of anything his lawyers were or were not doing for him. For all he knew, worker's compensation was the only remedy he had. The only way for him to become knowledgeable and appreciate the significance of limited representation was for his lawyers to tell him about other claims he might have. They failed to do that.[14]

Unfortunately, the plight of worker's compensation lawyers is not isolated. Two cases illustrate this point.

In a Colorado case, *International Telemarine Corp. v. Malone and Assoc., Inc.*, 845 F.Supp. 1427 (D.Colo. 1994), a law firm was retained to prepare Blue Sky filings for a corporation's initial public offering. The offering failed, and the corporation sued the law firm and the underwriter. The corporation claimed that the firm had a duty to disclose certain regulatory problems that the firm knew the underwriter was having.[15] The law firm sought summary judgment, but the federal district court denied the motion, finding evidence that the firm should have disclosed the underwriter's problems with the National Association of Securities Dealers. Noting that a lawyer may agree to perform work of limited scope, the court cautioned that the lawyer "cannot disregard circumstances which provide reasonable notice that the client may have legal problems or remedies which fall outside the scope of the undertaking."[16] In such circumstances, "the client should be informed of the need for legal assistance and that the attorney will not be providing such services."[17]

In an Illinois case, *Healy v. Axelrod Construction Co.*, 155 F.R.D. 615 (N.D.Ill. 1994), a law firm agreed to represent the trustee of a pension plan only for the limited purpose of filing a motion to dismiss; the firm told the trustee that if the motion failed, it could no longer represent him due to a conflict.[18] The court denied the motion to dismiss, and the trustee sought to disqualify the firm from defending the plan against the trustee's cross-claim. Rejecting the firm's argument that its representation of the trustee was strictly limited to filing the motion to dismiss and, therefore, that it did not constitute the "substantial relationship" necessary for disqualification, the court found that the firm had not properly established the parameters of its alleged limited representation. The problem for the firm was that its disclosure to the client fell far short of that contemplated by Model Rule1.2(c). The firm had not advised its client of: (1) the nature of the conflict; (2) any rights he might have against the Plan or other co-defendants; or (3) the advisability of obtaining independent counsel to represent him. It simply told him that "if they lost the motion, he was on his own."[19] That was not enough, said the court.

The moral of the stories

The message from these cases is clear: Communicate, communicate, communicate — face-to-face and in writing. When seeking to limit the objectives of client representation, take a few extra steps:

First, get the whole story from the client. Pay attention to facts or circumstances suggesting that the client may have legal problems beyond the scope of the contemplated representation. Do not rely on the client's self-diagnosis of his legal problem.

Second, thoroughly discuss with the client any other claims he may have and explain other issues that may need further consideration. Make certain that the explanation is "reasonably sufficient to permit the client to appreciate" its significance[20] and will "permit the client to make informed decisions regarding the representation."[21]

Third, advise the client that he should talk with independent counsel to determine whether to pursue any further legal action.

Fourth, memorialize the discussion in a limited representation/retention letter, specifying what the representation does and does not cover, and advising the client to obtain additional counsel as to the excluded matters. Provide a space at the conclusion of the letter for the client to sign, acknowledging that he understands the explanation provided and does not wish the representation to include anything other than the limited representation stated.

These steps obviously entail more work for the lawyer. This work at the front end of the representation, however, should pay big dividends in client satisfaction and lawyer peace-of-mind.

ENDNOTES

1 *See Warmbrodt v. Blanchard*, 692 P.2d 1282, 1285 (Nev. 1984); *see generally* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE ß 8.3 (4th ed. 1998)("Mallen & Smith").

2 *Warmbrodt*, 692 P.2d at 1285.

3 The Nevada Supreme Court adopted the ABA Model Rules of Professional Conduct, "with certain amendments approved by [the] Court," in 1986. Nev. S. Ct. R. 150(1). The Court noted that the preamble and comments to the Model Rules, though not enacted here, "may be consulted in interpreting and applying the Nevada Rules of Professional Conduct." *Id.* R. 150(2).

4 Model Rules of Professional Conduct, Terminology 2.

5 *Nichols v. Keller*, 19 Cal. Rptr. 2d 601 (Cal. App. 1993).

6 *Id.* at 605.

7 *Id.*

8 *Id.* at 610.

9 *Id.* at 608.

10 *Id.*

11 *Id.*

12 ABA Model Rules of Professional Conduct, Preamble, cmt. 18.

13 "A lawyer may limit the objectives of the representation if the client consents after consultation." *Id.*, Rule 1.2(c).

14 The lawyers' conduct in *Nichols* and similar cases also raises issues of lawyer competence. Pursuant to Model Rule 1.1, competent representation requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Among the necessary legal skills a competent lawyer must have, "the most fundamental legal skill consists of determining what kind of legal problems a situation may involve." Model Rule 1.1, cmt. 2. The thorny question of whether a lawyer's representation may be so limited as to be "incompetent," though beyond the scope of this article, is a subject that deserves serious consideration. *See* Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 311-12 (1997).

15 *International Telemarine Corp. v. Malone & Assoc., Inc.*, 845 F. Supp. 1427 (D. Colo. 1994).

16 *Id.* at 1433.

17 *Id.* at 1434.

18 *Healy v. Axelrod Constr. Co.*, 155 F.R.D. 615 (N.D. Ill. 1994).

19 *Id.* at 620.

20 See the definition of "consultation" in the Terminology section of the Model Rules.

21 Model Rule 1.4(b); Nev. S. Ct. R. 154(2). Comment 1 To Model Rule 1.4 elaborates: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are pursued."

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