

Unbundling Legal Services: Delivering What Your Client Wants at a Price She Can Afford

"I can't afford a retainer, but can you just look over this agreement and tell me if it's OK? I'll pay you for your time."

That is a question I encountered a few years back in my private practice. It seemed simple: give a client an hour of my time, perform a discrete task, charge a small fee (or not), then send her on her way.

It is not surprising that I received this request, and more like it since. Pro se litigants use the do-it-yourself approach to home remodeling and auto repair, so why not access the courthouse the same way? The internet arms them with forms, statutes, and advice columns. Accurate or not, this flood of information both empowers and confuses.

So I did the consultation, reviewed the stipulation, and charged a minimal fee. The experience left me with a vaguely uneasy feeling that I might have done a favor, but had I done enough?

New limited appearance rules promulgated by the Vermont Supreme Court, along with changes in the ethical rules, may help answer that question.

Limited Appearances Before Family, Superior, and Environmental Courts

The recent addition of Vermont Rule of Family Procedure 15(h) and permanent adoption of Vermont Rule of Civil Procedure 79.1(h) allow attorneys to enter a limited appearance in most family,¹ superior, and environmental² court cases. Both "unbundling" rules are a boon to attorneys willing to take part, but not all, of a case, allowing the attorney's talents to be targeted where most needed. Pro bono programs have long anticipated these rule changes to ease the task of recruiting volunteer attorneys.³

VRCP 79.1(h) was first adopted for a two-year trial period beginning April 14, 2006, and then was made a permanent rule change effective July 6, 2009. Although not widely used during the trial period, the rule "did prove effective in achieving its original purpose of providing the assistance of lawyers to courts and litigants at critical stages in trials or other proceedings and encouraging lawyers to take on pro bono representation."⁴

The family court unbundling rule at VRFP 15(h) is a newer addition, promulgated on December 10, 2009, to be effective on February 12, 2010.⁵ With the huge

increase in pro se litigants, particularly in family court, there is urgent need to have attorneys involved in at least part of the courtroom activity.

Both VRCP 79.1(h) and VRFP 15(h) have similar entry requirements for the attorney seeking to limit his or her appearance on behalf of a client.

- First, the client must agree to the limited representation by the attorney, and that agreement must comply with the Vermont Rules of Professional Conduct.⁶ While the representation agreement is not required to be in writing, the better practice would be to have at least a written checklist of what the attorney will and will not do, even, or perhaps especially, if the attorney is acting on a pro bono basis. Certainly, the attorney should have a conversation with the client clearly stating the limits of representation. This conversation would be minimal if the client were a knowledgeable consumer of legal services and familiar with the court system, but extended and simplified for those without such experience.
- Next, the attorney must file and serve written notice of limited appearance "as soon as practicable prior to commencement of the appearance." The notice must contain the purpose and scope of the appearance with specificity. The attorney is still subject to the obligations of Rule 11, so must make some inquiry of the client as to the particulars of that portion of the case that the attorney is undertaking.⁷
- Simultaneously with or shortly after the lawyer's entry of limited appearance, the client enters his or her own general pro se appearance.⁸
- The limited appearance purpose must be one enumerated under the applicable rule. VRCP 79.1(h)(1) allows an attorney under a limited service agreement to file complaints, pleadings and motions, to engage in discovery, to represent a client in a motions argument, alternative dispute resolution, pretrial conference, hearing, or to take or perfect an

appeal. With leave of court, the attorney is also allowed to enter the case for a specific issue or a portion of a trial or hearing. VRFP 15(h)(1) contains a similar list, and also includes matters unique to family court, such as appearance in case management, parent coordination, property or visitation master proceedings, or a particular "court event."⁹

The beauty of both rules is that the attorney may easily withdraw from the proceeding once the limited representation task is completed. A motion to withdraw must be filed under either rule, but if the agreed-upon task has been accomplished, the attorney can withdraw "as a matter of course" in civil court, and "without notice and hearing" in family court.¹⁰ Of course, if the task is not completed, the lawyer may withdraw only by leave of the court for good cause.

The easy exit aspect of both rules is particularly attractive to pro bono attorneys and the programs that recruit them. It is much easier to ask an overworked attorney to cover a hearing, or draft motion—tasks that might take a few hours—than to enter a full-blown lawsuit that could lead to seemingly endless litigation.

Limited Service and Ethical Considerations

While both rules address the growing need for limited appearances in court, neither speaks to the broader question of limited representation in the attorney-client relationship. Because my document review on behalf of a client did not take me into court, neither VRCP 79.1(h) nor VRFP 15(h) provided guidance. Nor was I "ghost writing" the documents for my client, an area of limited practice that raises the question of whether—or not—to alert the other side that an attorney is involved.¹¹

The Vermont Rules of Professional Conduct, including some recent changes, are more instructive on the issue of limited representation.¹² VRPC 1.2 (c) allows an attorney to limit the scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." "Informed consent" is defined under VRPC 1.0(e) to mean "agreement by a person to a proposed course of conduct after the lawyer has

communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action.”

My limited representation—review of a proposed divorce stipulation—seems to fit these rules well. I had a preliminary talk with my client, and found that she had already prepared the necessary divorce forms on her own and had visited the Vermont Judiciary website. She and her spouse had exchanged information about their assets, debts and income, and had had several settlement discussions. There was no real custody dispute, just adjustment of visitation. The spouse was not represented by counsel.

My stipulation review with her was a face-to-face meeting in my office. We went over all the terms, I offered comments and suggestions, listened to her reasons for her positions, and assured myself that she was not under duress. She was confident of her financial information and generally had done her homework. She could clearly handle the brief, uncontested hearing in court on her own.

Limited representation was reasonable under these circumstances,¹³ and my client was knowledgeable enough to give informed consent. Indeed she was clear that she did not want, nor could she afford, my full representation. Because of the brief nature of our relationship, I did not have her sign a written retainer agreement, although I did communicate to her the limits of my representation and what I would charge for the work, thus satisfying VRPC 1.5(b).¹⁴

If my client had gone to a legal advice clinic instead of calling me, she might instead have had an advice clinic attorney review her proposed stipulation. VRPC 6.5, discussed below, is a new rule aimed at promoting the establishment and use of limited service legal clinics.

Some Resources from Experienced Practitioners

Because limited service representation is relatively new to Vermont, some advice from lawyers who have incorporated unbundling in their own practice is useful. A comprehensive resource on limited legal service representation is the website for the American Bar Association’s Standing Committee on the Delivery of Legal Services.¹⁵ There, lawyers can find cases, ethics and court rules in unbundled jurisdictions, and a variety of forms and practice tips. Available for downloading from the website is “Unbundling 101: Expanding Your Practice Using Limited Scope Representation”¹⁶ by Sue Talia, an attorney who has pioneered limited service representation in California, and who is a sought-after lecturer on unbundling

throughout the country. Her materials contain rules, best practices, interview checklists, limited scope agreements, flowcharts and links to other limited scope practice websites.

At the VBA’s Solo and Small Firm Conference in May of 2009, Attorney Elizabeth J. Scheffee presented a workshop entitled “Expanding Your Practice Through Unbundling.” A Maine family practitioner, Scheffee spoke of her own unbundled practice experiences. Her sample limited representation agreement and limited appearance form, both of which she included in her presentation at the May workshop, are now available on the VBA website.¹⁷

Pro Bono Opportunities Unbundled

The pro bono community has welcomed the unbundling rules in civil and family courts in Vermont. There is constant need for attorneys to provide volunteer legal services throughout the state. With unbundling, attorney-resources can be stretched farther and targeted to the precise legal needs of each client. Legal Services Law Line of Vermont has already created its own limited services niche, providing over-the-phone advice and drafting forms for low-income Vermonters. There are other pro bono projects around the state that benefit from unbundling.

- The VBA’s Environmental Law Section worked with the Vermont Volunteer Lawyers Project to create the Environmental Law Project in the fall of 2009, using the unbundling provisions of VRCP 79.1(h). In this project, attorney-volunteers can represent litigants in all or part of environmental court matters. By entering a limited appearance, an attorney can appear at a single hearing, represent clients in mediation, draft and file pleadings such as statement of questions on appeal and motions for party status, or file and argue motions for summary judgment.
- The Military Family Law Project was initiated during the summer of 2009 to provide free legal services to deploying soldiers and their families. With VRFP 15(h) soon to be in place, attorney volunteers can limit representation in this family court project to modification of child support, enforcement of visitation/contact rights tailored to soldier-parents, or modification of custody.
- The Rutland Pilot Project continues to take advantage of VRCP 79.1(h) when its attorneys file limited appearances

to represent low-income clients in collection defense, foreclosure defense and evictions in Rutland Superior Court.

- Legal clinics existing in Caledonia, Washington, and Windsor counties, and new advice clinics being contemplated for other counties, can now tap both unbundling rules and new VRPC 6.5. Together, these rules will make it easier to assist low-income clients with advice-only services.

Conflicts Unraveled with New V.R.P.C. 6.5¹⁸

Rule 6.5 of the Vermont Rules of Professional Conduct directly addresses two lingering concerns that have stifled attorney-volunteers in advice clinic situations: long-term entanglements and conflicts of interest.

VRPC 6.5(a) allows attorneys to participate in non-profit or court-sponsored short-term limited legal service programs without creating any expectation that their representation will continue. Thus, an attorney can give short term legal advice for twenty minutes to one hour in a clinic setting, and then exit the matter for good. The requirements of the reasonableness of the limitation does not preclude the attorney from offering advice even when limited representation is not reasonable, but the attorney must tell the client that he or she has need of further legal assistance.¹⁹ In other states, the client’s informed consent is obtained by disclaimers on intake forms signed by the client, or by brief retainer letters.

The potential conflict-of-interest dilemma for the clinic attorney is addressed in VRPC 6.5(a)(1), which disqualifies the attorney “only if the attorney knows that the representation of the client involves a conflict of interest.” Similarly, VRPC 6.5(a)(2) provides that the volunteer clinic attorney is disqualified only if he or she is aware that a member of his firm would be disqualified.²⁰

Perhaps most significantly, VRPC 6.5(b) provides that a lawyer’s participation in a short-term legal clinic will not preclude the lawyer’s firm from taking on or continuing to represent clients whose interest may be adverse to clients seen by the clinic attorney in that limited setting.²¹

In the past, legal clinics run by county bar association have provided client lists to attorneys several days in advance of the clinic so that they and their firms could run conflict checks. Attorneys in larger firms have been reluctant to volunteer at all for clinics because of the potential that their firm could be precluded from future representation merely because one of their

attorneys had seen a client for an advice only session. The new Rule 6.5 will provide the protection and incentive for more attorneys to engage in pro bono work.

The timing could not be better. In these days of high unemployment and lowered earnings, many people cannot afford legal representation as it has traditionally been provided. With these changes in our procedural and professional rules, attorneys will be able to deliver legal services with precision and efficiency to more Vermonters.

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¹ VRFP15(h) specifically excepts matters under VRFP2 (Children in Need of Supervision) and VRFP3 (Termination of Parental Rights). Lawyers entering these cases cannot limit representation.

² Vermont Environmental Court Rule 3 applies the Vermont Rules of Civil Procedure "so far as those rules are applicable," including VRCP 79.1, to an enumerated list of civil actions in environmental court.

³ For a discussion on the benefits of unbundling, see Thomas F. Garrett, *Unbundling Legal Services*, Vt. B.J., Summer 2004, at 30.

⁴ Reporter's Notes – 2009 Amendment to VRCP 79.1(h).

⁵ The text of the rule can be viewed on the Vermont Judiciary website at www.vermontjudiciary.org.

⁶ See discussion below about ethical considerations of limited representation.

⁷ VRCP 11(b) requires the attorney and/or pro se client to make reasonable inquiry about the facts in controversy to rule out lawsuits brought to harass or delay, or for frivolous reasons, and to insure that there is factual and legal support for the allegations. VRFP 1(a)(1) makes VRCP 11(b) applicable to family court procedure.

⁸ Because the client enters a general pro se appearance, all papers required to be served under VRCP 5 on the party's attorney after the limited appearance is filed must be served upon both the pro se litigant and the attorney unless the attorney has been granted leave to withdraw. VRCP 79.1(h)(4), VRFP 15(h)(4). This does create some potential for conflict with Vermont Rule of Professional Conduct 4.2, which prohibits an attorney from communicating with a litigant known to be represented by counsel. Rule 4.2 carves out exceptions for communications directly with the litigant with consent of the other attorney, and for communications authorized by law or a court order. A letter from the limited appearance attorney to opposing counsel could constitute such "consent" as the rule anticipates. In unusual circumstances, opposing counsel can petition the court for an order allowing communications with the pro se client. See Comment [4] to Rule 4.2.

⁹ Because of the broader nature of family court proceedings, the term "court event" was used to indicate that representation may be limited by particular matters rather than by time. Reporter's Notes – 2009 Amendment.

¹⁰ VRCP 79.1(h)(3), VRFP 15(h)(3).

¹¹ See Garrett, *supra* note 3, at 32-33. As Executive Director of Legal Services Law Line of Vermont, Garrett explains Law Line's practice of disclosing their attorneys' involvement in

drafting pleadings.

¹² The Vermont Rules of Professional Conduct were rewritten this year to incorporate a comprehensive set of changes modeled after the ABA's Model Rules of Professional Conduct. For more information on the changes, see Introductory Reporter's Note—2009 Amendments to the Vermont Rules of Professional Conduct.

¹³ The phrase "reasonable under the circumstances" is not defined in the Rules of Professional Conduct. "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." VRPC 1.0(h).

¹⁴ Rule 1.5(b) of the Vermont Rules of Professional Conduct requires that an attorney communicate to the client the "scope of the representation and the basis or rate of the fee," preferably in writing.

¹⁵ See www.abanet.org/legalservices/delivery.

¹⁶ This thirty-nine page packet of program materials was authored by M. Sue Talia, Esq., in cooperation with the ABA Standing Committee on the Delivery of Legal Services and with the Legal Aid Society of Orange County (California).

¹⁷ www.vtbar.org/Upload%20Files/WebPages/CLE/2009seminar/2009solo/solo/5unbundling/2782_001.pdf

¹⁸ V.R.P.C. 6.5 became effective on September 1, 2009.

¹⁹ Comment [2] to VRPC 6.5

²⁰ Comment [3] and [4] to VRPC 6.5.

²¹ Comment [4] to VRPC 6.5; see also discussion under Reporter's Notes to VRCP 6.5.

