2016

Bankruptcy and Unbundling: Oil and Water

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BANKRUPTCY AND UNBUNDLING: Oil and Water?

By Professor Gary E. Sullivan and Jessica M. Zorn

Unbundling legal services–also known as "limited scope representation" or "discrete task representation"–allows an attorney to restrict her representation of a client to a specific task or issue instead of handling a client's matter comprehensively from beginning to end. *Alabama Rule of Professional Conduct* 1.2 has always allowed for limited scope representation, but the practice was sparsely used until specific procedures and forms became available in 2012.[1] There are three general categories for discrete task representation: consultation and advice, limited representation in court and document preparation.[2] Although unbundling in general litigation or simple transactional matters can create benefits that inure to both lawyer and client, unbundling and bankruptcy practice make strange bedfellows.

Generally, any attorney/client agreement involving an unbundled legal service must comply with the *Rules of Professional Conduct* and other applicable laws.[3] In the context of bankruptcy, attorneys must also comply with the local rules of the particular bankruptcy court, the *Federal Rules of Bankruptcy Procedure* and the *U.S. Bankruptcy Code*. The difficulty of rectifying a limited scope representation agreement with bankruptcy rules and practice raises serious doubts as to the feasibility of unbundling services when representing debtors in bankruptcy courts in Alabama.

The Merits of Limited Scope Representation Generally

Limited scope representation increases access to the legal system for lower- and middle-income litigants who may not be able to afford an attorney offering comprehensive services.[4]

This argument is particularly persuasive in the bankruptcy context because attorneys' fees have increased since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[5] Attorney fees after BAPCPA increased as much as 24 percent for Chapter 13 filers and–notably–48 percent for Chapter 7 debtors.[6] BAPCPA's enactment likely caused such cost increases because debtors must file more documents than before,[7] the means test may require complicated calculations and the statute made attorneys responsible for errors in a debtor's schedule. "Just as insurers charge higher premiums for greater risks and increased work, attorneys have charged higher fees to offset their new risks."[8] As filing bankruptcy becomes more expensive, fewer debtors can afford an attorney; limited scope representation has been proposed as a solution to this problem.

Unbundling provides certain benefits to attorneys as well. Discrete task representation ostensibly creates an opportunity for lawyers to expand their practice and market to lower-income clients.[9] Lawyers may be able to provide assistance to clients they might otherwise not have the time or inclination to fully represent.[10] These opportunities allow attorneys to collect additional fees where none existed (although, on the other hand, litigants who would have hired a full-service attorney may now choose to only hire an attorney for one or two tasks, thereby actually lowering the fees an attorney collects).

The Challenges of Unbundling Bankruptcy Services

As a general rule, unbundled service agreements must comply with all applicable ethical and procedural rules. In bankruptcy, however, attorneys may face difficulty rectifying a limited scope agreement with specific rules governing bankruptcy practice. The *Bankruptcy Code* does not mandate that an attorney fully represent a client, but most local rules nationally signal that an attorney *should* comprehensively represent her client.[11] The *Alabama Rules of Professional Conduct* allow an attorney to limit the scope of representation if the agreement is reasonable under the circumstances.[12] Lawyers should decline to offer unbundled legal services in the practice of bankruptcy because limited scope agreements raise serious concerns as to the attorney's compliance with other rules, thereby rendering a limited scope representation *unreasonable* under the circumstances.

A. Informed Consent Concerns

In general, "[a] lawyer may limit the scope of representation if . . . the client gives *informed consent*."[13] In order for a client to give informed consent, the attorney must disclose a wide array of information.[14] Bankruptcy attorneys face an ethical dilemma: the bankruptcy landscape is unusually complicated and technical. Can a client *really* give informed consent?

A debtor may wrongly assume that excluded services–like representation in adversary proceedings–are unnecessary, or that there is little risk to foregoing representation on those matters. The ethical concerns are heightened when one considers that the limited scope agreement ". . . comes at the suggestion of an attorney who often benefits from and has superior knowledge of the possible ramifications of excluding certain services."[15] Will attorneys fully disclose the risks of limited representation, including the decreased probability of the debtor receiving a discharge? In a related vein, the pressure of needing to file bankruptcy might cause a debtor to accept whatever terms are presented to her. The reliance on a lawyer's guidance is therefore heightened in bankruptcy proceedings. A debtor's ability to provide valid, informed consent is highly suspect considering a client's likely inability to grasp the materiality of a service and the consequences of its omission.[16]

B. Competency Concerns

An attorney must provide competent representation to her clients.[17] This duty is not waived by entering into a limited scope agreement.

Competent representation in the context of bankruptcy means that an attorney must help meet the debtor's objective of obtaining a discharge,[18] and yet largely *pro se* litigants are far less likely to receive a discharge.[19]

Can representation be considered competent if it fails to achieve the client's objectives for obtaining representation (i.e. obtaining a successful discharge)? Some courts have already answered "no"–competent representation precludes lawyers from picking aspects of bankruptcy cases to work on and neglecting others.[20] The issue remains to be squarely addressed in Alabama.

C. Diligence Concerns

A lawyer may face difficulty reconciling the duty of diligence[21] under a discrete task representation scheme. The duty of diligence–in the civil litigation context–is somewhat relaxed when it comes to filing pleadings. Whereas normally an attorney must investigate good grounds to support a pleading, attorneys who are only representing their clients in a limited capacity have the ability to rely on the client's communications *unless* there is reason not to do so.[22] Less diligence is required of an attorney drafting a civil pleading as an unbundled service.

In bankruptcy proceedings, however, attorneys are bound by local rules of the particular bankruptcy court, the *Federal Rules of Bankruptcy Procedure* and the *U.S. Bankruptcy Code*. Neither *Fed. R. Bankr. Proc.* 9011(b) nor 11 *U.S. Code* §707(b)(4)(C), governing pleadings, allows for a relaxation of the duty of diligence for bankruptcy attorneys offering unbundled services. This may render a wide swath of limited scope representation infeasible; for example, it might defeat the purpose of unbundling for an attorney to exercise diligence and research all aspects of a limited client's petition if the attorney is getting paid a nominal amount to simply prepare a schedule. Limited scope bankruptcy attorneys, held to a higher standard of diligence by the *Federal Rules of Bankruptcy Procedure* and the *Bankruptcy Code*, must be careful to satisfy their duty of diligence.

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D. Administration of Justice Concerns

The administration of justice in bankruptcy courts would suffer if litigants choose to forego outright representation for representation in a limited capacity.

First, limited scope representation may increase overall access to the bankruptcy system, but it would also likely increase the number of functionally *pro se* litigants. This would likely not lead to favorable outcomes for debtors. In 2007, the Consumer Bankruptcy Project found that the percentage of *pro se* litigants rose after the passage of BAPCPA, but the percentage of *pro se* litigants who received a successful discharge fell.[23] Shockingly, "[t]he entire post-BAPCPA increase in negative *pro se* outcomes is attributable to cases in which the debtors were alleged to have made technical errors."[24] Bankruptcy is simply too complicated for unrepresented debtors to navigate and discharges are being withheld on the basis of procedural, technical errors instead of on the merits of the filing.

Not only do the debtors themselves suffer if they litigate functionally *pro se*, but the courts themselves suffer. Debtors who are *pro se* or who only received assistance with documents are more likely to miss deadlines, neglect legal responsibilities and experience difficulties applying both procedural and substantive law.[25] Bankruptcy courts are likely to be increasingly burdened because "[s]elf-represented [or largely self-represented] litigants consume a disproportional amount of staff and judicial time."[26]

Lastly, the widespread implementation of limited scope representation may hamper the administration of justice because it has a disparate effect on debtors versus creditors. Creditors are unlikely to forego outright, complete representation, but debtors in financial distress are looking for the least expensive route. Overall, debtors may receive worse judicial outcomes and creditors would remain unaffected.

The practice of discrete task representation therefore gives rise to very serious ethical concerns in the context of bankruptcy practice. Empirically, it is difficult to rectify professional rules with a constrained representation agreement; although jurisdictions are increasingly recognizing the permissibility of unbundling, findings that bankruptcy attorneys followed the ethical rules in doing so are rare.[27] The merits of

limited scope agreements may render the practice helpful and even necessary in some areas of law, but bankruptcy attorneys should proceed with caution or altogether avoid it. ▲

Endnotes

1. Alabama Access to Justice Commission, *Frequently Asked Questions* (Oct. 16, 2015, 06:30 AM), *http://alabamaatj.org/wp-content/uploads/2013/08/Limited-Scope-Representation-for-Lawyers-Color.pdf.*
2. J. Anthony McLain, *Opinions of the General Counsel: The Unbundling of Legal Services and "Ghostwriting,"* 71 Ala. Law. 401, 401-2 (2010).
3. Alabama Rules of Prof'l Conduct R. 1.2 cmt.
4. McLain, 71 Ala. Law. at 402.
5. Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Limited Services Representation in Consumer Bankruptcy Cases* 49 (Final Report of the ABI National Ethics Task Force, 2013).
6. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17 (2012).
7. Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 Emory Bankr. Dev. J. 407, 419 (2009)(BAPCPA newly requires a debtor to file, among other things, a credit counseling certificate, a document explaining potential increases in expenses or income in the next year, a copy of all documents outlining any money obtained 60 days before the petition was filed and a federal income tax return before the creditors' meeting).
8. MacArthur, 25 Emory Bankr. Dev. J. at 434.
9. Henry A. Callaway, *Alabama's New Limited-Scope Representation Rules*, 73 Ala. Law. 262, 262 (2012).
10. McLain, 71 Ala. Law at 402.
11. Carrie A. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, 32-OCT Am. Bankr. Inst. J. 14, 14 (2013).
12. Alabama Rules of Prof'l Conduct R. 1.2(c).
13. Alabama Rules of Prof'l Conduct R. 1.2(c)(emphasis added).
14. The Restatement (Third) of Law Governing Lawyers offers the following guidelines:

    (i) a client must be informed of and consent to any "problems that might arise related to the limitation,"

    (ii) a contract limiting the representation is construed "from the standpoint of a reasonable client,"

    (iii) if any fee is charged, it must be reasonable in light of the scope of the representation,

    (iv) changes to representation me after an unreasonably long time after beginning representation must "meet the more stringent tests... for post inception contracts or modifications," and

    (v) the limitation's terms must be reasonable in light of the client's sophistication level and circumstances.

    Restatement (Third) of Law Governing Lawyers § 19 cmt. c. (2000).
15. Zuniga, 32-OCT Am. Bankr. Inst. J. at 14.

16. Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Limited Services Representation in Consumer Bankruptcy Cases* 49 (Final Report of the ABI National Ethics Task Force, 2013).
17. Alabama Rules of Prof'l Conduct R. 1.1.
18. Zuniga, 32-OCT Am. Bankr. Inst. J. at 14.
19. Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5, 23 (2009)(outlining a study of debtors in the Western District of Washington–chosen because of its almost four million people in 19 counties, both rural and metropolitan–which found that 15.0 percent of post-BAPCPA *pro se* litigants failed to receive a discharge whereas only 1.04 percent of post-BAPCPA represented clients failed to receive a discharge).
20. Zuniga, 32-OCT Am. Bankr. Inst. J. at 15.
21. Alabama Rules of Prof'l Conduct R. 1.3.
22. Alabama Rules of Civil Procedure R. 11(b)("In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of the facts, unless the attorney has reason to believe that such representation is false or materially insufficient").
23. Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Great Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1957.
24. *Id.*
25. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 Am. U.L. Rev. 1537, 1548 (2005).
26. The Center on Court Access to Justice for All, Discrete Task Representation (Oct. 16, 2015, 06:45 AM), *http://www.ncsc.org/microsites/access-to-justice/home/Topics/Discrete-Task-Representation.aspx*.
27. Zuniga, 32-OCT Am. Bankr. Inst. J. at 15.

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Gary Sullivan serves as associate professor of law in residence at the University of Alabama School of Law. His practice and scholarly interests focus on bankruptcy, commercial law and contracts. Professor Sullivan has presented papers and served on panels at academic and continuing education conferences in several states. He has been a member of the Alabama State Bar since 1996.

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FEBRUARY 2016 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	274
Number passing exam (includes MPRE deficient and AL course deficient)	116
Bar Exam Pass Percentage	42.3 percent

Bar Exam Passage by School

University of Alabama School of Law	92.3 percent
Cumberland School of Law	47.2 percent
Faulkner University Jones School of Law	45.8 percent
Birmingham School of Law	26.7 percent
Miles College of Law	0.0 percent

Certification Statistics*

Admission by Examination	113
Admission by Transfer of UBE Score	9
Admission without Examination (Reciprocity)	10

**Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period November 2, 2015 through May 4, 2016. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the* Rules Governing Admission to the Alabama State Bar.

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