AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 472** **November 30, 2015**

**Communication with Person Receiving Limited-Scope Legal Services**

*Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.*

*Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer's knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.*

*If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.*

*The lawyer must comply with Rule 4.2 and communicate with the person's counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.*

In this opinion the Committee addresses the obligations of a lawyer under ABA Model Rule of Professional Conduct 4.2, *Communication with Person Represented by Counsel*, commonly called the "no contact" rule, and ABA Model Rule of Professional Conduct 4.3,

*Dealing with Unrepresented Person,* when communicating with a person who is receiving or has received limited-scope representation under ABA Model Rule of Professional Conduct 1.2, *Scope of Representation and Allocation of Authority Between Client and Lawyer*.[1] We also provide recommendations for lawyers providing limited-scope representation.

Like all the Model Rules of Professional Conduct, Rules 1.2, 4.2, and 4.3 are intended to be rules of reason and must be construed and applied "with reference to the purposes of legal representation and the law itself."[2] In a limited-scope representation, the Model Rules in general, and Model Rule 4.2 specifically, must be interpreted accordingly because limited-scope representations do not naturally fit into either the traditional full-matter representation contemplated by Model Rule 4.2 or the wholly pro se representation contemplated by Model Rule 4.3.

**Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer**

Model Rule 1.2(c) reads: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[3] Today lawyers increasingly represent clients on a limited-scope basis.

Limited-scope representation may include assisting a litigant who is appearing before a tribunal pro se, by drafting or reviewing one or more documents to be submitted in the proceeding. "This is a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter." *See* ABA Formal Ethics Opinion 07-446 (2007).[4]

Although limited-scope representation is not restricted to low-income clients or small claims matters, the ABA Ethics 2000 Commission explained that the proposed amendments to Model Rule 1.2(c) and its Comments regarding limited-scope representations were in part "intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low- or moderate-income persons who otherwise would be unable to obtain counsel."[5]

Rule 1.2(c) requires a lawyer to secure the informed consent of a client when providing limited-scope services. Informed consent is defined as: "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and

1. This opinion is based on the Model Rules of Professional Conduct as amended by the American Bar Association House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdiction are controlling.

2. MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14].

3. MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

4. ABA Formal Op. 07-447 (2007) addressed the scope of representation of a client in a collaborative law setting. In that Opinion, the Committee determined that "[A] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." The Committee rejected the argument that courts are deceived by lawyers who "ghostwrite" legal documents for pro se litigants or that such conduct is "dishonest," noting that the conduct does not mislead the court or any party.

5. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 59 (Art Garwin ed., 2013).

explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[6] The Colorado Bar Association advised in Formal Ethics Opinion 101 that a lawyer providing limited-scope services to a client should "clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests."[7] The D.C. Bar Legal Ethics Committee advised in its Opinion 330 (2005) that the "client's understanding of the scope of the services" is fundamental to a limited-scope representation.[8] Opinion 330 recommended that lawyers reduce such agreements to writing:

> Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement . . . Particularly in the context of limited-representation agreements, however, a writing clearly explaining what is and is not encompassed within the agreement to provide services will be helpful in ensuring the parties' mutual understanding.[9]

Similarly, the Ethics 2000 Commission recommended adding a formal Comment to Rule 1.2 that a "specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee as required by Rule 1.5(b)." However, because the House of Delegates rejected the Commission's parallel proposal to amend Rule 1.5(b) — which would have required written fee agreements that included an explanation of the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible — this proposed Rule 1.2 Comment language was not advanced.[10]

Therefore, although not required by Rule 1.2(c), the Committee nevertheless recommends that when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in writing that the client can read, understand, and refer to later. This guidance is in accord with Model Rule 1.5(b) which explains:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the

6. MODEL RULES OF PROF'L CONDUCT R. 1.0(e).
7. Colorado Bar Ass'n Formal Op. 101 (1998, rev. by addendum 2006).
8. D.C. Bar Op. 330 (2005).
9. *Id.*
10. A LEGISLATIVE HISTORY, s*upra* note 5, at 61-62.

> same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The Committee notes that some state rules of professional conduct require a written agreement when a lawyer provides limited-scope services. *See, e.g.*, Maryland Lawyers' Rules of Professional Conduct, Rule 1.2(c)(3); Missouri Rule of Professional Conduct 1.2(c); Montana Rule of Professional Conduct 1.2(c)(2); and New Hampshire Rule of Professional Conduct 1.2(c) and 1.2(g). Other states explain that a written agreement is preferred. *See* Ohio Rule of Professional Conduct 1.2(c) and Tennessee Rule of Professional Conduct 1.2(c). Additionally, some state rules of civil procedure require a limited-scope appearance filing with the court identifying each aspect of the proceeding to which the limited-scope appearance pertains. *See, e.g.*, Illinois Supreme Court Rule 13(c)(6). Therefore, lawyers providing limited-scope representation are advised to review their state rules to determine whether a written agreement is required for their limited-scope representation.[11]

If a lawyer who is providing limited-scope services is contacted by opposing counsel in the matter, the lawyer should identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services. A lawyer providing limited-scope legal services to a client generally has no basis to object to communications between the opposing counsel and the client receiving those services on any matter outside the scope of the limited representation.

These issues would best be resolved at the inception of the client-lawyer relationship by the client giving the lawyer providing limited-scope representation informed consent to reveal to opposing counsel what issues should be discussed with counsel and what issues can be discussed with the client directly.

**Model Rule 4.2, Communication with Person Represented by Counsel: Is there a duty to ask?**

The ABA ethics rules have included a "no-contact" rule since the 1908 adoption of the ABA Canons of Professional Ethics.[12] Current Model Rule 4.2 reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be

11. Because a tribunal may require disclosure of the scope of the services performed by the lawyer, and because a client receiving limited-scope services may desire to disclose to opposing counsel the scope of services performed by the lawyer, the Committee cautions lawyers providing limited-scope services to draft their limited-scope legal service agreement so that the agreement does not reveal information beyond that necessary for the client, opposing counsel, or the tribunal to determine the scope of the representation. For an example of a limited-scope agreement that lists services to be performed, see Reporter's Notes to Maine Rule of Professional Conduct 1.2 Limited Representation Agreement. The agreement lists 20 categories of legal services.

12. ABA Canon 9: "Negotiations with Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." Canon 9 is available at: http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf.

> represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Model Rule 4.2 protects clients who have chosen to be represented by a lawyer from having another lawyer interfere with the client-lawyer relationship by, for example, seeking uncounseled disclosure of information and/or uncounseled concessions and admissions related to the representation.[13] A lawyer directly communicating with an individual, however, will only violate Rule 4.2 if the lawyer *knows* that the person is represented by another lawyer in the matter to be discussed.[14] "Knows" is defined by the Model Rules as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[15]

ABA Model Rule 4.3 reads:

> 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. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Lawyers confronted with a person who appears to be managing a matter *pro se* but may be receiving or have received legal assistance, often are left in a quandary. May the lawyer assume that such persons are proceeding without the aid of counsel and, therefore, speak directly to them about the matter under Model Rule 4.3, or should the lawyer first ask whether they are represented in the matter and then proceed accordingly under either Rule 4.2 or 4.3?

Interpreting Model Rule 4.2 in July 1995, ABA Formal Ethics Opinion 95-396, noted:

> It would not, from such a practical point of view, be reasonable to require a lawyer *in all circumstances* where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel: among other things, such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well

13. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [1].

14. *See, e.g.*, Okla. Bar Ass'n v. Harper, 995 P.2d 1143 (Okla. 2000) (lawyer did not violate Rule 4.2 without actual knowledge of the representation. "Ascribing actual knowledge to a lawyer based on the facts is not the same as applying the rule under circumstances where the lawyer should have known.").

15. MODEL RULES OF PROF'L CONDUCT R. 1.0(f).

> unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.[16] (Emphasis added.)

Thus, while the black letter of Model Rule 4.2 does not include a duty to ask whether a person is represented by counsel, this Committee reiterates the warning of Comment [8] to Rule 4.2 that a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by "closing eyes to the obvious."[17]

In circumstances involving what appears to be an unrepresented person, but in fact may be a person represented by a lawyer under a limited-scope agreement, a lawyer's knowledge that the person has obtained some degree of legal representation may be inferred from the facts.[18] Such circumstances include, for example: when a lawyer representing a client faces what appears to be a pro se opposing party who has filed a pleading that appears to have been prepared by a lawyer or when a lawyer representing a client in a transaction is negotiating an agreement with what appears to be a pro se person who presents an agreement or a counteroffer that appears to have been prepared by a lawyer.[19]

Therefore, the Committee recommends that, in the circumstances where it appears that a person on the opposing side has received limited-scope legal services, the lawyer begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. This may assist a lawyer in avoiding potential disciplinary complaints, motions to disqualify, motions to exclude testimony, and monetary sanctions, all of which could impede a client's matter.[20] It is not a violation of the Model Rules of Professional Conduct for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists.

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16. ABA Formal Op. 95-396, fn. 39 (1995). Immediately after the release of Formal Opinion 95-396, Rule 4.2, Comment [5] was amended to read: "The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is a substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." However, the Ethics 2000 Commission recommended to the ABA House of Delegates that the sentence explaining "inference" be deleted, and the House adopted this recommendation in 2002. According to the "Reporter's Observations" document submitted to the House with the Ethics 2000 Commission resolution, this description of the knowledge requirement was "inconsistent with the definition of 'knows' in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire." *See* A LEGISLATIVE HISTORY, *supra* note 5, at 566, citing ABA House of Delegates Report 401 (Feb. 2002).

17. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [8].

18. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (defining "knows").

19. *See generally* State Bar of Arizona Op. 05-06 (2005) (filing of documents prepared by lawyer but signed by client receiving limited-scope representation is not misleading because ". . . a court or tribunal can generally determine whether that document was written with a lawyer's help.").

20. *See, e.g.*, Weeks v. Independent School Dist. No. I-89, 230 F.3d 1201 (10th Cir. 2000) (affirming district court's disqualification of lawyer who interviewed members of control group in violation of Rule 4.2).

If the person discloses representation under a limited-scope agreement and does not articulate either that the representation has concluded (as would be the case if the person indicates that yes, a lawyer drafted documents, but is not providing any other representation), or that the issue to be discussed is clearly outside the scope of the limited-scope representation, then the lawyer should contact opposing counsel to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving limited-scope services.[21]

When the communication concerns an issue, decision, or action for which the person is represented, the lawyer must comply with Rule 4.2 and communicate with the person's counsel.

The lawyer may communicate directly with the person on aspects of the matter for which there is no representation.[22] For these communications, the lawyer must comply with Rule 4.3. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. We note that Rule 1.6 and the confidentiality of communications between a lawyer and the lawyer's client does not end when the limited representation concludes. Therefore, any communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about communications between the person and the lawyer providing limited-scope services.

If at any point in the matter the person — or the lawyer providing the limited-scope representation to that person — notifies the communicating lawyer that the scope of the representation was expanded, the communicating lawyer must act in accordance with Rule 4.2 as to any issues, decisions, or actions implicated by the expansion of the scope of services.

**Conclusion**

Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.

Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer's knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the

21. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [3] ("A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.").

22. MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person ... concerning matters outside the representation.").

lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.

If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.

The lawyer must comply with Rule 4.2 and communicate with the person's counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.